Supreme Court of the United States.

TERM, 1909.

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JAMES H. McKENN

IN THE MATTER

OF

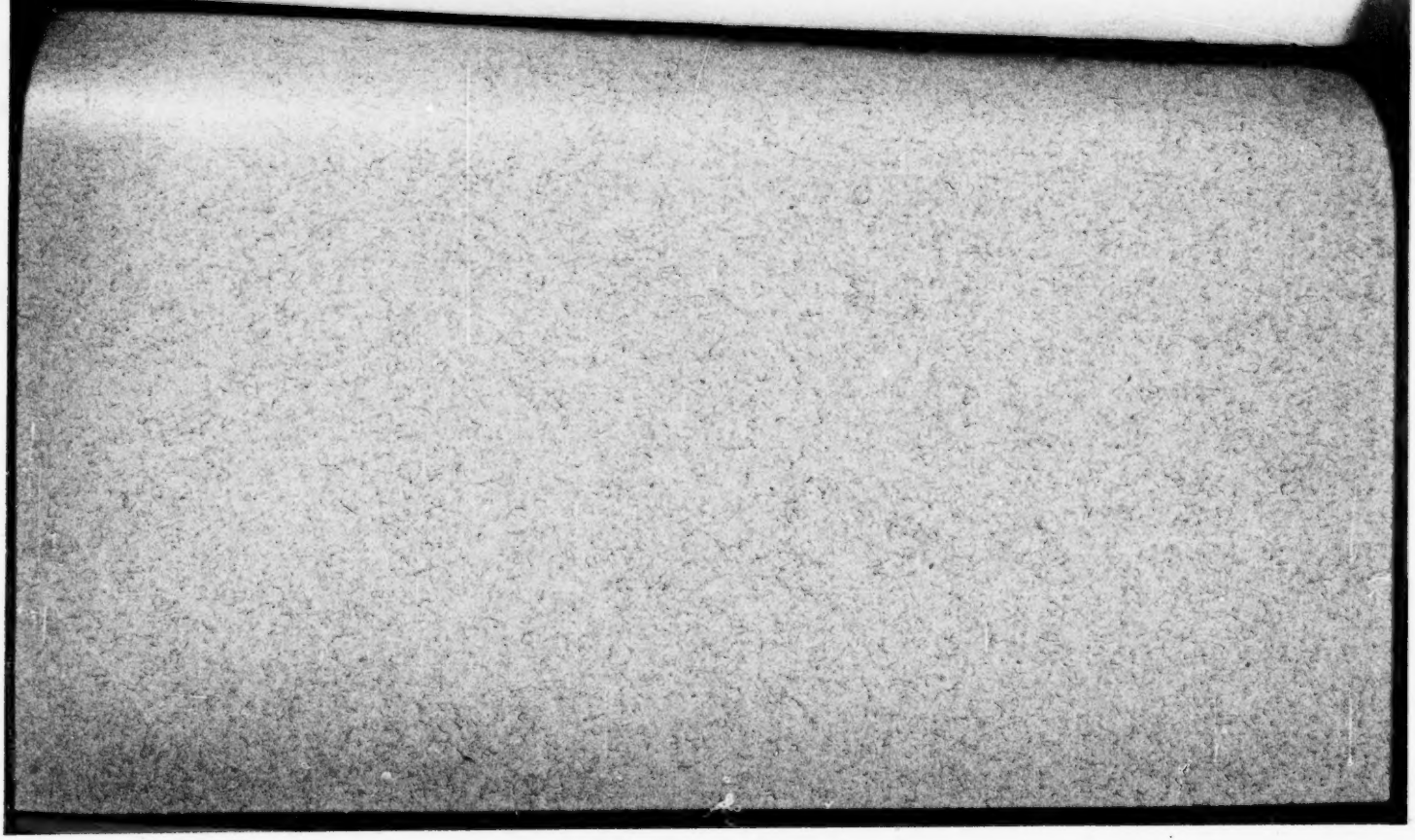
The Application of MARY HATCH RIGGS, as Administratrix of the Goods, Chattels and Credits of Clarence B. Riggs, deceased, in behalf of herself and all others similarly situated, for a Writ of Mandamus against the Honorable George C. Holt and Charles M. Hough, Judges of the District Court of the United States for the Southern District of New York, and against the District Court of the United States for the Southern District of New York.

Petition for Mandamus and Motion for Leave to file the same, and for Rule.

BENJAMIN S. CATCHINGS
Of Counsel for Petitioner,
Holland House,
New York.

(Consultation Office.)

Lawyers Appeal Printing Co., N. Y. 'Phone 2511 Worth.



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In the Supreme Court of the United States.

In the Matter

of

The application of MARY HATCH RIGGS, as Administratrix, in behalf of herself and others similarly situated for a Writ of Mandamus against the Honorable George C. Holt, Charles M. Hough, Judges of the District Court of the United States, and against the United States District Court for the Southern District of New York.

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And now comes the petitioner, Mary Hatch Riggs, administratrix of the goods, chattels and credits of Clarence B. Riggs, deceased, by her counsel; and she moves for leave to file the petition for a writ of mandamus hereto annexed, and she further moves that a rule be entered and issue directing the Honorable George C. Holt and Charles M. Hough, Judges of the District Court of the United States for the Southern District of New York and the District Court of the United States for said district, to show cause why a writ of mandamus should not issue against them and each of

4 them in accordance with the prayer of said petition, and why said petitioner should not have such other and further relief in the premises as may be just and meet.

BENJAMIN S. CATCHINGS,
Of Counsel for Petitioner Mary Hatch Riggs.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and to his Associate Justices of the Supreme Court of the United States:

5 The petition of Mary Hatch Riggs, administratrix of the goods, chattels and credits of Clarence B. Riggs, deceased, a resident and citizen of the State and County of New York, and of the United States, respectfully shows, upon information and belief:

1. Your petitioner is, and at all the times herein mentioned, was a creditor of the New York Tunnel Company, which is and then was a corporation organized and existing under the laws of the State of New York for the purpose of constructing a railroad tunnel under East River between the Bor-
6 oughs of Manhattan and Brooklyn, in the City of New York, and the approaches thereto.

2. On May 23d, 1907, Andrew D. Baird, David H. Smith, and William H. Clark, creditors of the New York Tunnel Company, filed a petition in bankruptcy in the District Court of the Southern District of New York, in which petition it was alleged and shown that the said New York Tunnel Company was a New York domestic corporation, and was "engaged in the business of building and contracting," and said petition failed to show that

the principal business of said corporation was "trading, printing, publishing, mining, manufacturing or a mercantile pursuit." On said May 23, 1907, William H. Clark, one of the above-named petitioning creditors, filed a petition for a receiver, and in said petition alleged and proved that the New York Tunnel Company "has a contract for the construction of the tunnel from New York to Brooklyn, to be used for the purpose of a railroad between the boroughs of Manhattan and Brooklyn." Upon such petition for receiver and proof, and upon the consent of the New York Tunnel Company, an order was entered May 23, 1907, by Honorable George C. Holt, prior to the adjudication, if any, of the New York Tunnel Company, to be a bankrupt, by which T. Tileston Wells, Esq., was appointed receiver, and, among other things, it was ordered: 8

> "That said receiver be authorized, in his dis-
> "cretion, to continue the business of such bank-
> "rupt in constructing the tunnel now under
> "construction, running from Battery Park, in
> "the Borough of Manhattan, under the East
> "River, to the Borough of Brooklyn." 9

That on May 23, 1907, T. Tileston Wells, Esq., filed his petition and affidavit for the appointment of his attorneys as receiver, and presented the same to Honorable George C. Holt, Judge U. S. District Court, and it was therein alleged and proved:

> "That your petitioner is informed and be-
> "lieves that one of the largest assets of the
> "said New York Tunnel Company is a certain
> "contract which said company has for the con-
> "struction of the tunnel from New York to

10 "Brooklyn, to be used for the purpose of a "railroad between New York and Brooklyn."

That on May 28, 1907, T. Tileston Wells, Esq., receiver, applied for appointment of a consulting engineer, and in his petition and affidavit alleged and proved, and filed with Honorable George C. Holt, that:

"The principal business of the said alleged "bankrupt is the construction of the tunnel "between New York and Brooklyn." "That in
11 "the course of construction of said tunnel it is "necessary that your petitioner should have "the aid, advice and assistance of a competent "and experienced engineer, skilled in sub- "marine tunnel construction, who will assist "and advise him in connection with the work "of construction of said tunnel."

And upon such affidavit and proof and prior to the adjudication of the corporation to be a bankrupt, Honorable George C. Holt, decreed that:

"It satisfactorily appears that said receiver
12 "is conducting the business of said New York "Tunnel Company, and it satisfactorily ap- "pears that said receiver requires the advice of "a competent engineer skilled in submarine "tunnel construction."

Thereafter, on May 29, 1907, Honorable George C. Holt entered an order purporting to adjudicate the New York Tunnel Company a bankrupt upon the consent of said corporation, and simultaneously therewith appointed T. Tileston Wells, Esq., receiver for said corporation.

Thereafter, on June 10, 1907, T. Tileston Wells, Esq., filed a petition and affidavit seeking leave to continue the business of the New York Tunnel Company, and therein showed to Honorable George C. Holt:

"That your petitioner has investigated the "affairs and assets of said bankrupt and has "ascertained that its chief asset consists in cer- "tain rights in a certain contract made between "Andrew Onderdonk and the Rapid Transit "Subway Construction Company, dated De- "cember 19, 1902, and assigned to said bank- "rupt, wherein and whereby it was provided "that said Onderdonk and his assigns should "receive from said Subway Construction Com- "pany a certain sum for the construction of "said tunnel under the East River, and said Onderdonk undertook in behalf of himself and "assigns to construct said tunnel in accordance "with the plans referred to in said contract." "That while your petitioner has been conduct- "ing the business of the bankrupt, said Sub- "way Construction Company has been paying "for the material furnished and labor employed "in the actual work of constructing said tun- "nel."

"Your petitioner has not space available to "store the same without greatly hindering and "impeding the work of construction of said "tunnel."

And upon said affidavit and petition, Honorable George C. Holt decreed and ordered on June 10, 1907:

"Ordered, that said receiver be and hereby

16 "is authorized in his discretion to continue the "business of such bankrupt in constructing the "tunnel now under construction running from "Battery Park in Manhattan, under the East "River to Brooklyn."

That in the said orders and decrees of the Honorable George C. Holt, Judge of the District Court of the Southern District of New York, it was adjudicated and determined prior to the said alleged adjudication in bankruptcy by said respondent, Honorable George C. Holt, that the principal business of the New York Tunnel Company was and
17 had been the construction of a subaqueous railroad tunnel under the East River in New York, and at all times herein referred to it was known to said respondent, apparent upon the face of the record in said cause and so determined by him, that the principal business of the New York Tunnel Company, prior to said alleged adjudication, was not principally that of a corporation engaged in printing, publishing, mining, manufacturing, trading or mercantile pursuits, and that said corporation was not such a corporation as under Section four b of the bankruptcy law of 1898, as was subject to the jurisdic-
18 tion of his court in bankruptcy.

That under and by virtue of said orders and under direction of said respondent, Honorable George C. Holt, T. Tileston Wells, Esq., took *defacto* possession, as an officer of the said District Court, of all the assets and property of the New York Tunnel Company, and either as *defacto* receiver or trustee has retained and now holds *defacto* possession or claim to all of said property adverse to the claims and rights of petitioner.

3. That complainant, Mary Hatch Riggs, is ad-

ministratrix of the goods, chattels and credits of 19
Clarence B. Riggs, deceased, and on May 25, 1908, she obtained a judgment against said New York Tunnel Company in the sum of Thirty-eight thousand Five hundred eigthy-seven 17/100 ($38,587.17/100) dollars, which has been duly entered and filed in the County Clerk's office of New York County. On May 23, 1907, and on May 29, 1907, and until said May 25, 1908, her claim against said Tunnel Company had not been reduced to judgment and was a *tort* claim arising out of the negligence of New York Tunnel Company, which resulted in the death of her intestate. The said complainant 20
was not scheduled as one of the creditors of the New York Tunnel Company, and received no notice of the filing of the petition in bankruptcy on May 23, 1907, and had no notice whatsoever prior to the said alleged adjudication of bankruptcy on May 29, 1907, and she was afforded no opportunity whatever to appear and plead in said proceedings in opposition to said petition and said alleged adjudication, although she had a material interest and right in and to a portion of the assets of the New York Tunnel Company, and, as is more fully shown below, she has continually and frequently asserted her rights and demanded an opportunity to op- 21
pose the said petition and adjudication, but respondents hereto have at all times denied her any and all relief in the premises, and have deprived her of the said rights and property without due process of law, and without just compensation, contrary to the Constitution of the United States and of the State of New York.

4. On May 31, 1907, Honorable George C. Holt issued an order to show cause why the suit of complainant Riggs pending in the State Court should

22 not be restrained and proof thereof be had before a special master, and pending the hearing thereof said respondent was enjoined from prosecuting her said suit. Thereafter, proceedings were had wherein it was shown to respondent, Honorable George C. Holt, that to try out said cause before a master in bankruptcy would necessitate heavy disbursements by complainant, and that the condition of the record and the facts were such that the Court was without jurisdiction over New York Tunnel Company, by reason of the nature of its business, and that the decisions in the federal courts made the
23 proving of a *tort* claim in bankruptcy of doubtful legality. Notwithstanding said objections, however, and upon all the records in the cause, said respondent on October 15, 1907, finally restrained the prosecution of the suit of this petitioner, and the liquidation of said claim was referred to Honorable Stanley W. Dexter to determine the amount and validity thereof. Pending said proceedings before the District Court, one Gennar Tamburi, as administrator, was similarly restrained under an order to show cause by Hon Stanley W. Dexter, referee, and thereafter by respondent Hon. George C. Holt, and in said cause the facts and the record
24 hereinabove alleged in connection with the business of New York Tunnel Company, was repeatedly called to the attention of the said District Court, and to the attention of the respondents, and the Tamburi claim was also shown to have been a *tort* claim. But notwithstanding the condition of the record and said objections, respondent likewise restrained Tamburi from prosecuting his suit in the State Court. Your petitioner thereafter joined with said Tamburi estate in a petition to review the two restraining orders of the respondent, George C. Holt, before the United States Circuit Court of

Appeals, which petition to review was filed November 11, 1907, and with all due speed and diligence, petitioner caused said petition to review to be prosecuted to issue and effect. And in all the said Tamburi proceedings counsel for petitioner was acting for Tamburi and said proceedings were in the nature of test proceedings for the benefit of all similarly situated. 25

5. Your petitioner, in her first petition to review, showed the petition in bankruptcy of May 23, 1907, the alleged adjudication thereon, the various affidavits, orders and decrees above described both before and after said alleged adjudication whereby it affirmatively appeared on the record that the New York Tunnel Company was principally engaged in the construction of a subaqueous railroad tunnel. Upon said petition to review, a decision was handed down by Judge Noyes, of the Circuit Court of Appeals, reversing the said orders of respondent Honorable George C. Holt upon the errors of law incident to the provability of petitioner's *tort* claim in bankruptcy, but the Circuit Court of Appeals failed to pass upon the radical assignment of errors arising out of the condition of the record as above set forth and the principal business of the New York Tunnel Company. The Court of Appeals held in effect that a direct motion to attack the adjudication order should be made. (*Vide*, 159 Fed., 688.) Such a practice was also approved at about the same time in Altanwood Park case, 160 Fed., 448. 26 27

Following this practise, your petitioner, together with James Kelly, J. A. Beauregard, David Murphy, John Pridy, Richard Creedon, John Hughes, James H. Cooligan, William Fitzgerald, James Forbes, Philip Donovan, Ellen Stack, administra-

trix, *tort* creditors, and Borne Scrymser Company, a contract creditor, joined in the making of a motion before the District Court of the Southern District of New York, with D. Allen's Sons Rope Company, a contract creditor, which said motion was that an order be entered in the matter of New York Tunnel Company "vacating, setting aside and annulling all the acts, orders and decisions of the District Court, including the order of adjudication entered on the 29th of May, 1907, the order appointing a receiver, entered May 23, 1907, and for an order allowing any party in interest to answer, plead or demur to the petition of creditors to have said New York Tunnel Company adjudged a bankrupt," and for such other relief as might be just and proper.

6. That such a motion would be made was first noticed by D. Allen's Sons Rope Company in behalf of themselves and all others who might wish to join therein on June 12, 1907, when a notice of motion was served and service admitted by the attorneys for New York Tunnel Company, T. Tileston Wells, receiver of New York Tunnel Company, and Andrew D. Baird, David H. Smith, and William H. Clark, the original creditors in bankruptcy, which notice of motion stated that the motion would be addressed to the jurisdiction of the court "on the ground that New York Tunnel Company is not such a corporation as can be adjudicated bankrupt under Section four b of the Bankruptcy Statute of 1898, as amended, and that this court has not jurisdiction herein." The said notice of motion was served by counsel for Allen's Sons Rope Co., who was, and is, also counsel for your petitioner, and the above-named *tort* creditors—and was so made and all adjournments thereof were

made with the understanding that said motion would be continued and adjourned so as to preserve the rights of Allen's Sons Rope Co. and said *tort* creditors to raise the question of jurisdiction in the form of a motion should it become ultimately necessary so to do; which necessity did not develop until the decision of the Circuit Court of Appeals entered about March 1, 1908. 31

The time for the presentation of said moving papers and the making of said motion in behalf of Allen's Sons Rope Company and said *tort* creditors and all parties in interest was thereafter adjourned under written stipulation with and in each instance at the request of the attorneys for T. Tileston Wells as receiver and trustee for New York Tunnel Company, and said stipulations were each signed by attorneys for the said trustee, the petitioning creditors and New York Tunnel Company. Each of said stipulations contained the following: 32

> "It is further stipulated that the said ad-
> "journment shall be without prejudice to any
> "rights D. Allen's Sons Rope Company have un-
> "der said motion, and the delay caused thereby
> "shall not be considered to be laches on the
> "part of said intervening creditor." 33

There were about fourteen such stipulations, and the time for the presentation and making of the motion addressed to the jurisdiction of the court was thereby extended to March 30, 1908.

On March 24th, 1908, D. Allen's Sons Rope Company transferred and assigned to one Charles Evans all its rights and interests in its claim against New York Tunnel Company. The claim having been represented by Benjamin S. Catchings as attorney of record in said

bankruptcy proceedings, continued to be represented by him, as no order of substitution of attorneys was ever presented to him or filed in said case. And said Rope Company and its assignee continued to be bound by the representations and agreements of their said counsel with your petitioner and said *tort* creditors.

7. Having been brought before respondent Hon. George C. Holt and the District Court by his order to show cause and having repeatedly called the attention of the District Court to the character of New York Tunnel Company's business and the fact that the record affirmatively showed that said corporation was not subject to the Bankruptcy Statute, and having sought and obtained a review of the orders of the District Court before the Circuit Court of Appeals of Second Circuit, and having had the question of the jurisdiction of the court again ignored, your petitioner and said *tort* creditors required of their said counsel that he comply with his agreement and join in the making of a formal motion to vacate and set aside the adjudication of New York Tunnel Co. to be a bankrupt in behalf of said Rope Company and its assignee, and thereby preserve the benefit and effect of said stipulations of adjournment which had been obtained in their behalf. Between March 30th and the date when said motion was finally presented, several adjournments in open court were had, up and until the presentation of the said motion and the argument thereof, and up and until the present time there has been no laches or delay on the part of your petitioner from the time she was restrained on May 31, 1907, up until the present time, she has continuously and constantly resisted the jurisdiction of the said respondents over New York Tun-

nel Company and over her claim and person and all 37
rights, if any, which T. Tileston Wells, as receiver and trustee, may claim, and all rights arising out of said alleged adjudication have arisen with full knowledge that the jurisdiction of the court was in question and that said motion would be made.

8. After several adjournments in open court, and on May 11, 1908, the said motion of D. Allen's Sons Rope Company, Borne Scrymser Company, Mary Hatch Riggs administratrix; James Kelly and said *tort* creditors, came on to be heard before Hon. Charles M. Hough, who was sitting as Judge of the District Court. Upon the motion calendar, 38
and upon said presentation, the record, the petition in bankruptcy, the affidavits, and orders above described were shown, and the principal business of New York Tunnel Company was shown to have been the construction of a subaqueous railroad tunnel. The adjournment stipulations above described were also presented and shown, and thereupon Judge Charles M. Hough decided as follows:

> "The Altenwood Park Co. Case (C. C. A., Mch. 10, '08) apparently leaves such questions as this to depend on the petitioners' laches and the quantum of intervening rights. The *tort* 39
> creditors not having provable claims would under Columbia R. E. Co., 4 A. B. R., 411, have no absolute right to be heard on this motion. The Borne Scrymser Co. is guilty of great laches and the Allen Co. has no claim at all.
>
> But, however erroneous this adjudication was, it was a decree or judgment of a court of competent jurisdiction, never appealed from; upon the faith thereof, a million dollars have been spent and valuable rights vested and even under the lax practice approved in the Altenwood case, this motion should be and is denied.
>
> 4, 11, '08. C. M. H.,
> D. J."

40 The said decision was confirmed by formal order, May 15, 1908, when the motion was in all respects denied. In this decision Hon C. M. Hough was wholly in error in stating One million dollars had been spent, and his error arose through a statement in papers submitted without notice by opposing counsel after argument, which showed that in completing the tunnel, Rapid Transit Subway Construction Company spent some $800,000, but the alleged receiver and trustee has not borrowed any portion thereof and is in no sense liable therefor. Thereafter complainant Riggs, together with all
41 of the moving parties above described, except Allen's Sons Rope Company, on May 25th, 1908, appealed from said order, and said appeal was allowed to the Circuit Court of Appeals of the Second Circuit. Simultaneously therewith they brought a petition to review before said Court of Appeals, and said proceedings were consolidated; your petitioner, with the other appellants' petitioners, prosecuted with diligence this second petition to review and appeal to the Circuit Court of Appeals, and on December 15th, 1908, a decision was handed down (see , Fed.)
42 dismissing the appeal and petition for review, and in said decision is the following:

> "It must be admitted that *tort* claimants "who see the property of a person against 'whom they make claim seized and adminis- "tered in bankruptcy to their own exclusion "for the benefit of contract creditors, have an "interest which should be protected and are "in bad case if law afford no remedy. We "are, however, clear that they can have no re- "lief in this case in the proceedings they have "adopted. If there be no other remedy, the

"bankruptcy law should be amended to cover 43
"such cases."

The said decision was followed by formal mandate December 29, 1908.

9. Thereafter, on December 21, 1908, your petitioner, together with James Kelly, Borne Scrymser Company and the *tort* creditors who had joined with her in said appeal, appeared before the District Court of the Southern District of New York, after having duly notified all parties in interest, and moved a rehearing of the motion to vacate the adjudication and for other relief. This motion came 44
on before respondent, Hon. George C. Holt, who made the original adjudication in bankruptcy on May 29, 1907. At this hearing his attention was again called to the record in the case, the business of the Tunnel Co., and to all the papers and affidavits used in the two appeals.

Upon this hearing, respondent Hon. George C. Holt refused to entertain the motion which was made in form as a new motion, and also a rehearing motion, and in his order entered December 24th, 1908, says:

45
"It appearing that a motion was made in
"behalf of the same parties before Hon. C. M.
"Hough, one of the Judges of this court, for
"the same purposes on May 15, 1908, and that
"on said date a decision was rendered thereon
"denying the said motion, and it appearing
"that in orderly procedure a motion for the
"rehearing of the motion and decision of Hon.
"C. M. Hough should be first made before him
"and should not be reheard by another Judge
"of the same court unless such rehearing shall
"have first been referred by him. Now, it is

46 "ordered, that the said motion for rehearing "be and the same hereby is referred to Hon. "C. M. Hough, one of the Judges of the Dis-"trict Court for the Southern District of New "York."

10. After several efforts to present said motion before Judge Hough, counsel for complainant Riggs addressed a letter to Hon. Charles M. Hough on January 16, 1909, as follows:

"January 15, 1909.

Hon. C. M. Hough,

47 Addressed.

Dear Sir:—

In the matter of New York Tunnel Company —an appeal was taken from your order denying the motion of *tort* creditors to set aside the adjudication. The Appellate Court upheld your views that the *tort* creditors had no standing in court. They practically held that when property of a corporation is taken in bankruptcy, that the *tort* creditors should be entitled to a hearing, but that unless the action

48 of the lower court was absolutely void, they could not interfere, and therefore dismissed the proceedings.

The law seems to make it discretionary entirely with the District Court as to what relief can be given to these creditors. We have made a motion for re-hearing, which in ordinary course of practice came on before Judge Holt. He entered an order in which he stated that until you had first referred the motion to him he could not re-hear a motion which had once been decided by you. In view of the

fact that the motion which you decided was practically an application for re-hearing of a decision made by Judge Holt, it would seem that the proper practice at that time would have been to have allowed the matter to go before Judge Holt. At any rate, there seems to be no other course open to us than a full presentation of the matter before Judge Holt, who made the adjudication originally, and whose opinion we should be entitled to have upon our motion for re-hearing. In view of the indefiniteness as to when you will be sitting and in view of the peculiar exigencies of this case, I would ask that you permit this motion for re-hearing to be heard by Judge Holt; and I believe that a letter will be sufficient for this purpose.

I am sending a copy of this communication to Philbin, Beekman & Menken, attorneys for the trustee, and to Garvin, Armstrong & Conger, attorneys for the New York Tunnel Co., and am using this method of communicating with you at the suggestion of the Clerk's Office.

Yours very truly,
Benjamin S. Catchings,

Counsel for Mary Hatch Riggs and others."

On January 20, 1909, the following letter was received in reply:

"New York City, January 19th, 1909.

Benjamin S. Catchings, Esq.,
Holland House, N. Y.

Dear Sir:—

Judge Holt requests me to say: that Judge Hough has referred to him your letter of Jan-

52 uary 15th, asking that Judge Hough permit the motion for rehearing, in the matter of the New York Tunnel Company, to be heard before Judge Holt, and Judge Holt understands that Judge Hough has no objection to Judge Holt taking any action in the case that he think fit. Judge Holt considers, however, that there is no propriety in his rehearing a motion decided by Judge Hough; it is, in substance, nothing but an appeal from one judge to another. A rehearing is not a matter of right. Judge Hough's health is such that he undoubt-
53 edly is not able to give you a rehearing, and Judge Holt declines to give a rehearing on a matter decided by Judge Hough.

Yours very truly,

G. E. McIlwaine."

11. During all of said time the receiver and trustee, T. Tileston Wells, has made no contracts of importance whereby he has become liable for the payment of money since May 23, 1907. The Rapid Transit Subway Construction Company, with whom the New York Tunnel Company had a contract to build the tunnel between Brooklyn and
54 New York, has furnished the money, materials and labor to complete the said tunnel under agreement with the New York Tunnel Company, and T. Tileston Wells as receiver, whereby the moneys so used would be applied as an offset against any claim against said Subway Construction Company on the part of the Tunnel Company arising out of said contract. Under said agreement, the claim of the Tunnel Company against the Subway Construction Company has been preserved and probably increased by about $80,000.00. But none of such amount has been paid to or received by the receiver

or trustee, and is due under the original contract 55
with the Tunnel Company. Up to May 24, 1908, only about $60,000 out of a total of about $250,000 contract claims had been proven in bankruptcy against New York Tunnel Company, and none of about thirty claims in *tort* have been allowed to prove their claims. The *tort* claims originally amounted to about $600,000 in amount claimed, and will probably be finally adjudicated at about $250,000. Those *tort* claimants, together with your petitioner, have been and are now deprived of their share in the assets of the Tunnel Company without due process of law, and without compensation by 56
the acts and orders of respondents.

Complainant Riggs, together with James Kelly and Borne Scrymser Co., have instituted and are prosecuting in behalf of all creditors of the Tunnel Company, a judgment creditors' action against the stockholders of the Tunnel Company to recover $175,000 in dividends alleged to have been wrongfully paid, and in said action said T. Tileston, Esq., as trustee, has asserted a claim to all of such amount as may be recovered, to the exclusion of complainant and said *tort* crelitors.

12. Your petitioner is informed and believes that 57
she has exhausted every remedy in the District and Appellate Court, and that her right of appeal to the Supreme Court from the decision of the Court of Appeals is doubtful and is opposed by a number of federal authorities, and that she is without remedy at law. Your petitioner has been put to great trouble and expense in and about her efforts to obtain a participation in the assets of New York Tunnel Company, and is unable to take the steps necessary to obtain an amendment of the statute as suggested by the Circuit Court of Appeals, and

that her relief in the premises is wholly dependent upon the result of this petition and such equitable relief as may be granted by the Supreme Court of the United States.

Petitioner verily believes that the District Court is entirely without jurisdiction over New York Tunnel Company, and that this is apparent upon the face of the record, and was so apparent when the alleged adjudication was made, and that the practise of the Supreme Court has justified this application for relief in *ex parte* Bradley, 7 Wall., 364; Virginia vs. Rives, 100 U. S., 313; Virginia vs. Paul, 148 U. S. 107; Kentucky vs. Powers, 201 U. S., 1; *ex parte* Wisner, 203 U. S., 449.

13. Wherefore your petitioner prays that a rule be made and issue from this honorable court, directed to the said Honorable George C. Holt and Charles M. Hough, District Judges of the United States for the Southern District of New York, and directing the said District Court of the Southern District of New York to show cause why a writ of mandamus should not issue, commanding the said Judges and the said court, and each of them, to dismiss the said petition in bankruptcy against said New York Tunnel Company, and all proceedings therein, and to vacate the said order of adjudication in bankruptcy and to vacate the orders appointing and discharging the receiver and the selection of a trustee for New York Tunnel Company, and to desist from exercising any further jurisdiction in the matter of New York Tunnel Company, excepting the entry of an order dismissing the said petition and said proceedings; or, in the alternative, such a writ commanding them to reopen the said altered adjudication in bankruptcy and allow your petitioner, or any party in interest,

to appear and be heard in opposition to said petition in bankruptcy and an adjudication thereon; or, in the alternative, that a writ of prohibition may issue from this honorable court forbidding the said honorable District Judges of the United States for the Southern District of New York from taking any further proceedings in the matter of New York Tunnel Company and from taking any further proceedings in connection with the property assets and effects of New York Tunnel Company, and for such other and further relief in the premises as shall seem just and meet, and your petitioner will ever pray, etc. 61 62

MARY HATCH RIGGS,
Administratrix

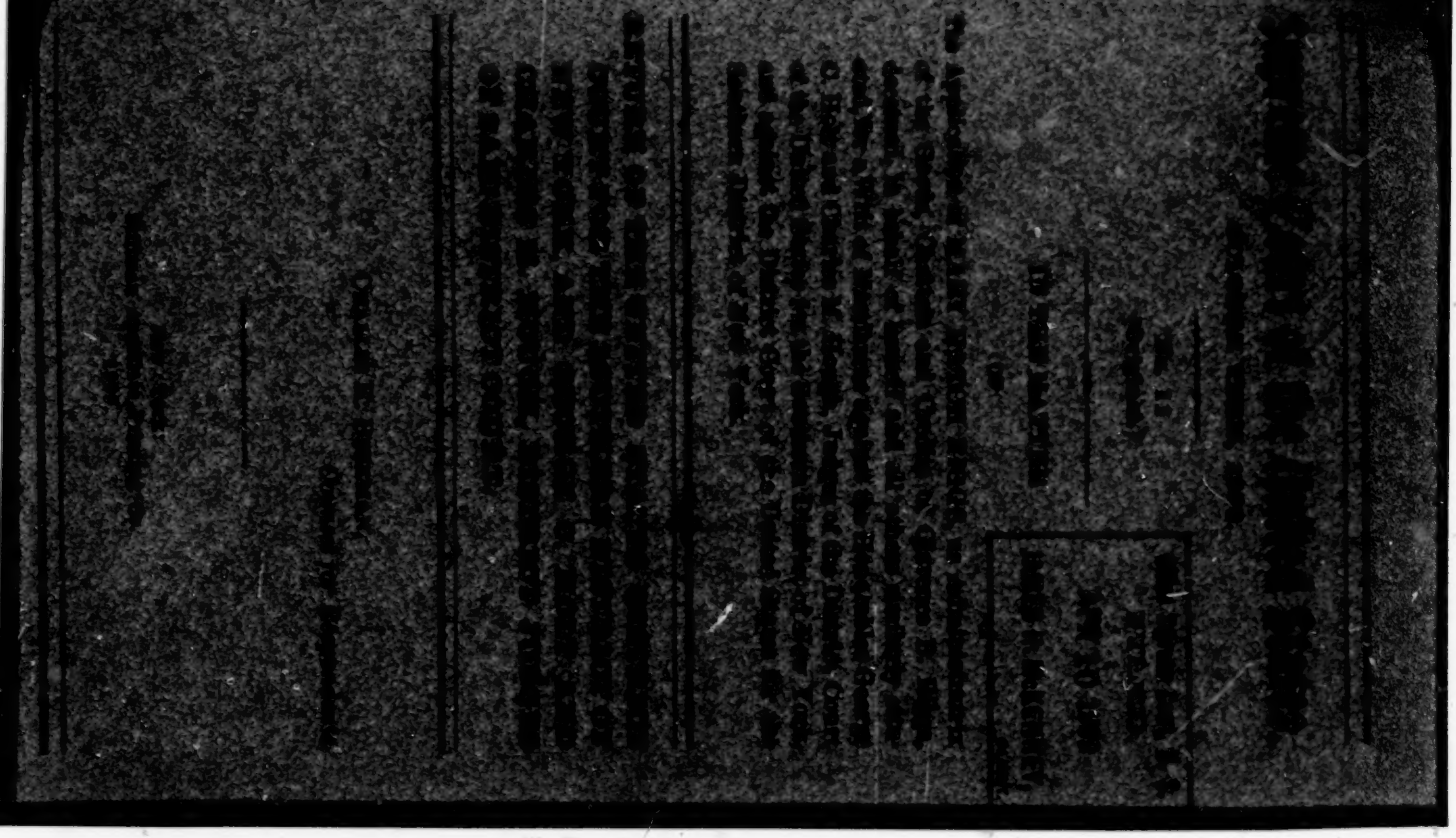
BENJAMIN S. CATCHINGS,
Of Counsel.

State of New York,
County of New York,
Southern District of New York, } ss.:
District of Columbia,
City of Washington,

Mary Hatch Riggs, being duly sworn, deposes and says: I am the petitioner above named. The foregoing petition is true to the best of my knowledge, information and belief. 63

MARY HATCH RIGGS.

Sworn to before me this
4 day of February, 1909.
Notarial Seal. William Buckingham.
Notary Public.



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Supreme Court of the United States. 1

In the Matter

of

The Application of MARY HATCH RIGGS, as Administratrix of the Goods, Chattels and Credits of Clarence B. Riggs, deceased, in behalf of herself and all others similarly situated, for a Writ of Mandamus against the Honorable George C. Holt and Charles M. Hough, Judges of the District Court of the United States for the Southern District of New York, and against the District Court of the United States for the Southern District of New York.

October Term, 1908.
Original No. 11. 2

Return of George C. Holt and Charles M. Hough, District Judges of the United States District Court for the Southern District of New York.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States: 3

In compliance with the order to show cause why the prayer of the petitioner should not be granted, issued by this Honorable Court on the 1st day of March, 1909, the above-named respondents do hereby respectfully present that:

On the 23d day of May, 1907, a petition was filed in the United States District Court for the South-

ern District of New York by Andrew W. Baird, David H. Smith and William H. Clark, creditors of The New York Tunnel Company, praying that the New York Tunnel Company be adjudged bankrupt for reasons in said petition contained, and upon consent being filed by the New York Tunnel Company, an order was thereupon signed by the respondent George C. Holt and entered on the 23d day of May, 1907, by which order T. Tileston Wells was appointed Receiver of The New York Tunnel Company, and directed, among other things, to continue the business of the bankrupt, which was then engaged in constructing a tunnel extending from Battery Park in the Borough of Manhattan under the East River to the Borough of Brooklyn.

Thereafter and on the 29th day of May, 1907, an order adjudging The New York Tunnel Company a bankrupt was signed by the respondent George C. Holt and entered on that day. A copy of the petition, order appointing Receiver and order of adjudication are hereto annexed marked respectively Exhibits "A", "B" and "C".

On May 31, 1907, upon application by the Receiver, the respondent George C. Holt granted an order to show cause why the prosecution of an action then pending in the Supreme Court of the State of New York and brought by Mary Hatch Riggs, as administratrix of the goods, chattels, and credits of Clarence B. Riggs, deceased, against The New York Tunnel Company for damages, alleging that the death of the said Clarence B. Riggs had been brought about through the negligence of The New York Tunnel Company, should not be stayed and proof of the damage set forth in the complaint in that action had before a Special Master, and pending the return of the order to show cause, restraining Mary Hatch Riggs, as administratrix, from prosecuting

the action referred to. On October 25th, after hearing argument upon the return of the order to show cause, the respondent George C. Holt made an order restraining Mary Hatch Riggs, as administratrix, from prosecuting the action above mentioned and directing that the matter of her liquidation of her claim be referred to Stanley W. Dexter, Esq., as Special Master, to hear the testimony, and to determine and liquidate the amount of the claim after Mary Hatch Riggs, as administratrix, should have filed her proof of a non-liquidated claim with Stanley W. Dexter, Esq., as Referee in Bankruptcy, before whom the bankruptcy proceedings were then pending. A copy of the petition and the order referring the claim to Stanley W. Dexter, Esq., are hereto annexed and marked respectively Exhibits "D" and "E" 7 8

After the making and entry of that order and on November 29th, 1907, the present petitioner Mary Hatch Riggs, as administratrix, by her counsel, Benjamin S. Catchings, together with certain other so-called tort creditors of The New York Tunnel Company, filed a petition directed to the Honorable United States Circuit Court of Appeals in and for the Second Circuit, praying for the review of the order of the respondent Holt, which referred to Stanley W. Dexter, Esq., the matter of the claim of the said Mary Hatch Riggs, as administratrix. A copy of the petition for review is hereto annexed and marked Exhibit "F". 9

In the said petition, Mary Hatch Riggs, the then and present petitioner, sought to raise the question of the jurisdiction of the District Court over The New York Tunnel Company. After argument in the Circuit Court of Appeals in and for the Second Circuit, the said Court, per Hon. Walter C. Noyes, Circuit Judge, handed down an opinion, a copy of which is hereto annexed and marked Exhibit "G", in which said Court held, among other things, that

10 the tort claims were not provable in bankruptcy proceedings, and further that upon such review, the petitioner could not obtain a review of the District Court's jurisdiction of the bankruptcy proceeding. Thereupon, pursuant to a mandate of the Circuit Court, the order of the District Court was reversed, and an order to that effect entered in the District Court on the 28th day of February, 1908, a copy of which is annexed hereto and marked Exhibit "H".

Thereafter and on the 11th day of May, 1908, upon a notice of motion, affidavit and exhibits, copies of which are hereto annexed, and appear at pages 51 *et seq.*, of this return under separate fly leaf, marked Exhibit "I", the present petitioner,
11 Mary Hatch Riggs, as administratrix, in conjunction with other so-called tort creditors, and one contract creditor, asking leave to intervene in the pending proceeding, moved before the United States District Court for an order setting aside the order of adjudication and all other orders and proceedings in bankruptcy had in the United States District Court, and this motion came on to be heard before the respondent, Charles M. Hough, on the 11th day of May, 1908, and after hearing argument, the respondent, Charles M. Hough, handed down a memorandum, a copy of which is hereto annexed included under Exhibit "I",
12 and pursuant thereto on the 15th day of May, 1908, an order was signed by the respondent, Charles M. Hough, and entered, denying the motion made by Mary Hatch Riggs, as administratrix, and others, for leave to intervene and to set aside the order of adjudication and other proceedings theretofore had. A copy of this order is included in Exhibit "I" at page 116.

On the 25th day of May, 1908, the present petitioner Mary Hatch Riggs, by notice of appeal and assignment of errors, copies of which are annexed hereto and marked respectively, Exhibits

"J", "K", and "L", appealed to the Circuit Court 13
of Appeals in and for the Second Circuit, from the order made by the respondent, Charles M. Hough, denying the motion of the present petitioner to intervene and to set aside the order of adjudication in bankruptcy, and also sought a review of said order by a petition for review a copy whereof is hereto marked Exhibit "MM". Upon stipulation annexed hereto and marked Exhibit "N", the appeal and petition for review of Mary Hatch Riggs and others, were consolidated and heard together. After argument had in the said Circuit Court of Appeals, the Court handed down an opinion, per Honorable Henry G. Ward, 14
Circuit Judge, on the 15th day of December, 1908, a copy whereof is hereto annexed and marked Exhibit "O", wherein it appears that the Court held that the United States District Court had acquired jurisdiction over The New York Tunnel Company, and that the present petitioner and those similarly situated had no standing in the bankruptcy proceedings, but were strangers thereto, and that the contract creditor had acquiesced in the adjudication and therefore could not attack it, and suggested that the petitioners could only call the Court's attention to the alleged lack of jurisdiction as *amici curiae*. Thereafter, and on the 5th day
of January, 1909, upon the mandate of the 15
United States Circuit Court of Appeals in and for the Second Circuit, a copy of which is hereto annexed marked Exhibit "OO", which directed that the appeal taken by the petitioner be dismissed, an order was signed by the respondent, George C. Holt, and entered making the order of the United States Circuit Court of Appeals the order of the United States District Court, and thereby denying the motion of the petitioners to set aside the adjudication of The New York Tunnel Company as a

16 bankrupt. A copy of said order is annexed hereto and marked Exhibit "S".

On the 24th day of December, 1908, Benjamin S. Catchings, as counsel for the present petitioner, Mary Hatch Riggs, appeared before the respondent, George C. Holt, upon a notice of motion, a copy of which is hereto annexed and marked Exhibit "P", and attempted to renew the motion theretofore made by Mary Hatch Riggs, as administratrix, for leave to intervene and set aside the adjudication of The New York Tunnel Company as a bankrupt, and for a rehearing of said motion, and as appears by the notice of motion referred to above, the motion was made upon the original motion papers, with no ad-
17 ditional papers or cause shown for renewal, although the original motion and the order made thereon had at that time been sustained by the United States Circuit Court of Appeals. The respondent, George C. Holt, inasmuch as the original motion had been heard by the respondent, Charles M. Hough, referred the motion to renew and for a rehearing of the original motions to the respondent, Charles M. Hough, and signed an order to that effect on the 24th day of December, 1908, which order was duly entered, a copy whereof is hereto annexed marked Exhibit "Q". There is also annexed hereto and marked Exhibit "R", an affidavit of Richard S.
18 Steel, which was filed and read upon the motion to renew the original motion to set aside the adjudication in bankruptcy.

Prior to any decision upon the motions by the respondent, Charles M. Hough, and on the 15th day of January, 1909, Benjamin S. Catchings, as counsel for the present petitioner, Mary Hatch Riggs, as administratrix, addressed a letter to the respondent Charles M. Hough, a copy of which is hereto annexed and marked Exhibit "T", requesting that the respondent, Charles M. Hough, refer the motions to the respondent, George C. Holt, inasmuch as

the respondent, George C. Holt, had signed the order of adjudication in bankruptcy. This letter was submitted to the respondent, George C. Holt, for reply, and on the 19th day of January, 1909, the respondent, George C. Holt, caused to be written to Benjamin S. Catchings, as counsel for Mary Hatch Riggs, as administratrix, a letter, a copy of which is annexed hereto and marked Exhibit "U", in which the respondent, George C. Holt, declined to hear the motion for the reason that such procedure would be tantamount to hearing and deciding an appeal from an order made by his associate District Judge, the respondent, Charles M. Hough. 19

No disposition of the motion has, therefore, been made by the respondent, Charles M. Hough, nor has the respondent, Charles M. Hough, refused to hear the motion, nor has any application for such hearing been made to said respondent who from December 15, 1908, to March 22, 1909, was ill and consequently absent from his official duties. The respondents believe they are bound and controlled by the opinion of the United States Circuit Court of Appeals in and for the Second Circuit, and that they have no power to hear and determine a renewal of these motions after the same have been passed upon by the United States District Judge, Charles M. Hough, and his order affirmed by the United States Circuit Court of Appeals, inasmuch as the motions, so made before the respondent, Charles M. Hough, and at the request of counsel for the moving party, referred to the respondent, George C. Holt, are not made nor do they purport to be made on new papers, nor is any additional cause shown for the renewal and re-hearing of such motions. 20 21

As far as your respondents are aware, no petition for a writ of certiorari directed to the United States Circuit Court of Appeals in and for the Second Circuit has been asked of the Honorable

22 Judges of this, the Supreme Court of the United States. Nor has the present petitioner taken any steps to appeal to this Court, and the respondents are informed that the time for such application for writ of error or appeal has expired.

Since the adjudication of The New York Tunnel Company as a bankrupt, as appears in the exhibits submitted herewith, the Receiver, who afterwards became the Trustee, has continued the business of The New York Tunnel Company, and by virtue of a certain contract, a copy of which is annexed hereto and appears at pp. 89 *et seq.*, and other transactions negotiated and carried on by him, has completed the construction of the tunnel on which The
23 New York Tunnel Company was engaged at the time of the filing of the petition and adjudication in bankruptcy.

The contract referred to was duly approved by an order of the Referee in Bankruptcy as more fully appears in a copy of the same, hereto annexed, marked Exhibit V.

Messrs. Philbin, Beekman & Menken, solicitors for the petitioning creditors in the bankruptcy proceedings, have desired to be heard, and in order to secure them an opportunity, the respondents hereby designate Charles K. Beekman, Esq., of that firm, to present this return and to file such proof and
24 make such argument as may be required on the order to show cause.

All of which is respectfully submitted.

Dated New York, April 12th, 1909.

United States District Court in and
for the ~~Second~~ Southern District of New York.

by GEORGE C. HOLT,
and CHARLES M. HOUGH,
District Judges.

EXHIBITS.

Exhibit A—Petition in Bankruptcy and Consents.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Andrew D. Baird, David H. Smith and William H. Clark shows:

That the New York Tunnel Company of the City, County and State of New York, a domestic corporation, has for the greater portion of six months next preceding the date of the filing of this petition, had its principal place of business at Battery Park in the Borough of Manhattan, City, County and State of New York, in said District and is engaged in the business of building and contracting.

That the said New York Tunnel Company owes debts to the amount of one hundred thousand dollars ($100,000) and over, and is insolvent, and is neither a wage earner or a person engaged principally in farming or the tillage of the soil.

That your petitioners are creditors of the said New York Tunnel Company, having provable claims against it which amount in the aggregate in excess of valuables and securities held by them to $500, and that neither of your petitioners is entitled to priority of payment on his claim, within the meaning of Section 60 a-b of such law as amended.

That the nature and amount of your petitioners' claims and the securities held by them, if any, are as follows:

That your petitioner A. D. Baird, is a creditor of the said New York Tunnel Company to the amount of $1,388 for goods sold and delivered.

That your petitioner David H. Smith is a creditor of the said New York Tunnel Company to the amount of $177.06 for goods sold and delivered.

28 That your petitioner William H. Clark, is a creditor of the said New York Tunnel Company to the amount of $1,367.45 for goods sold and delivered.

That within four months preceding the filing of this petition, to wit, the 21st day of May, 1907, the said New York Tunnel Company while insolvent committed an act of bankruptcy by admitting in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground.

Wherefore, your petitioners pray that service of this petition with a subpœna may be made upon the said New York Tunnel Company, as provided by said Bankruptcy Law of 1898 as amended, and that it be adjudged a bankrupt within the provision
29 of said law.

ANDREW D. BAIRD,
DAVID H. SMITH,
WM. H. CLARK.

PHILBIN, BEEKMAN & MENKEN,
Attorneys for Petitioners.

UNITED STATES OF AMERICA,
Eastern District of New York,
State of New York,
County of Kings, } ss.:

30 ANDREW D. BAIRD, being duly sworn, says that he is one of the petitioners named in the foregoing petition and who executed the same, and does hereby make solemn oath that the statements contained in the foregoing petition subscribed by him are true.

ANDREW D. BAIRD.

Sworn to before me this 21st day of May, 1907.

ARCHIBALD C. WEEKS,
Notary Public,
(Seal.) Kings County.

UNITED STATES OF AMERICA,
Southern District of New York,
State of New York,
City and County of New York, } ss.: 31

DAVID H. SMITH, being duly sworn, says, that he is one of the petitioners named in the foregoing petition, and who executed the same, and does hereby make solemn oath that the statements contained in the foregoing petition subscribed by him are true.

DAVID H. SMITH.

Sworn to before me this 21st day of May, 1907.

N. F. SULLIVAN,
Notary Public,
New York County. 32

UNITED STATES OF AMERICA,
Southern District of New York,
State of New York,
City and County of New York, } ss.:

WILLIAM H. CLARK, being duly sworn, says, he is one of the petitioners named in the foregoing petition and who executed the same, and does hereby make solemn oath that the statements contained in the foregoing petition subscribed by him are true. 33

Sworn to before me this 22d day of May, 1907.

JOHN P. CURRY,
Notary Public,
New York County.

(Endorsed)—Filed May 23, 1907.

34 **Exhibit B—Order Appointing Receiver.**

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Alleged Bankrupt.	In Bankruptcy. No. 9835.

35

Whereas a petition for adjudication of bankruptcy was on the 23d day of May, 1907, filed against the New York Tunnel Company, of Battery Park, Borough of Manhattan, City of New York, in said District, and the said petition is still pending; and

Whereas it satisfactorily appears that it is absolutely necessary for the preservation of the estate of said bankrupt that a Receiver be appointed to take charge of and hold such estate and that he continue the business of said bankrupt, and said New York

36 Tunnel Company having consented to the appointment of a Receiver herein;

Now on motion of Philbin, Beekman & Menken, Esqs., attorneys for the petitioners, it is

Ordered that T. Tileston Wells of said District be and hereby is appointed Receiver of said bankrupt, on filing an additional bond as Receiver, in the sum of 25,000 Dollars with sufficient sureties, to be approved by the Court, and thereupon such Receiver to take charge of and hold such estate until further order; and it is further

Ordered that should said New York Tunnel Company be adjudicated a bankrupt, said Receiver shall continue as such, with the power herein conferred until the appointment and qualification of a trustee of said bankrupt; and it is further 37

Ordered that said T. Tileston Wells, Esq., upon the filing and approval of his said bond as Receiver, be and he is hereby authorized to apply to any other District Court of the United States within the district whereof any property of said bankrupt may be situated, for the appointment of ancillary Receiver or Receivers, and for such other order or orders as may be in aid of the primary jurisdiction of said United States District Court for the Southern District of New York; and it is further 38

Ordered that said Receiver be authorized in his discretion to continue the business of such bankrupt in constructing the tunnel now under construction running from Battery Park in the Borough of Manhattan, under the East River to the Borough of Brooklyn, in the City of New York, for a period of 20 days or until further order;

Witness the signature of the Judge of said Court, and the seal thereof, this 23d day of May, 1907.

GEO. C. HOLT,
J.

New York Tunnel Company hereby consents to the entry of the above order. 39

NEW YORK TUNNEL COMPANY,
By D. L. HOUGH,
President.

(Seal. N. Y. Tunnel Co.)

Attest:
H. E. BROOKS,
Secretary.

State of New York,
County of New York, } ss.:
Southern District of New York,

On the 23d day of May, 1907, before me personally came David L. Hough, to me known, who being by me duly sworn, did depose and say that he resided in the City of New York; that he is the president of the New York Tunnel Company, the corporation described in and which executed the above consent to the appointment of a Receiver of said corporation; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

JOHN S. HEEP,
Notary Public,
N. Y. Co

Exhibit C—Order Adjudicating N. Y. Tunnel Co. a Bankrupt. 43

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Bankrupt.	In Bankruptcy 44

At New York City, in said District, on the 29th day of May, A. D. 1907, before the Honorable George C. Holt, Judge of the said Court in Bankruptcy, the petition of Andrew D. Baird, David H. Smith and William H. Clark of the New York Tunnel Company be adjudged an involuntary bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered and the said New 45
York Tunnel Company having appeared herein by its attorneys, Garvan, Armstrong and Conger, and having consented that it be declared and adjudged bankrupt it is hereby declared and adjudged bankrupt accordingly.

And it is further ordered that the said bankrupt file schedules in triplicate as required by law within ten days from the date hereof.

And it is further ordered that the said matter be referred to Stanley W. Dexter, Esq., one of the

46 referees in bankruptcy of this Court, to take all such further proceedings therein as are required by said Acts of Congress, and all such acts therein as the Court might take or perform, except such as by law or the general orders of the Supreme Court are required to be performed by the Judge; and that the said bankrupt shall attend before said referee on the 4th day of June, 1907, at 10 o'clock A. M., and thenceforth shall submit to such orders as may be made by said referee or by the Court relating to its said bankruptcy.

Witness, the Honorable George C. Holt, Judge of said Court, and the seal thereof, at the City of New York, in said District, on the 29th day of May, A.
47 D. 1907.

GEO. C. HOLT,
District Judge.

THOS. ALEXANDER,
Clerk.

(Endorsed)—Filed May 29, 1907.

48

Exhibit D—Petition of Receiver to Stay Prosecution of Action Brought by Mary Hatch Riggs as Administratrix. 49

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Bankrupt.	In Bankruptcy. No. 9835.

50

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of T. Tileston Wells respectfully shows:

51

That he is Receiver of the New York Tunnel Company, the bankrupt above named, having been duly appointed by the Hon. George C. Holt, Judge of this Court, on the 23d day of May, 1907.

That your petitioner has duly filed the bond prescribed by the order appointing him such Receiver.

That on the 29th day of May, 1907, upon the consent of the New York Tunnel Company, it was declared and adjudged a bankrupt.

That at the time of the filing of said petition a suit was pending in the Supreme Court of New

52 York State, Kings County, wherein one Mary Hatch Riggs, as administratrix of the goods, chattels and credits of Clarence B. Riggs, deceased, was plaintiff, and in which said New York Tunnel Company was sole defendant, which is an action brought to recover the sum of $50,000 for the death of Clarence B. Riggs, plaintiff's intestate, alleged to have been caused by the negligence of the defendant.

That Don R. Almy, of 68 William street, in the Borough of Manhattan, City of New York, is the attorney of record for plaintiff in said action, and your petitioner is informed and verily believes that the trial of said action is set for Monday, June 3,
53 1907, in the Supreme Court of the State of New York for the County of Kings, and there is danger of a judgment being entered against said New York Tunnel Company and thereby additional expenses will be imposed upon the estate of said company, lessening the assets thereof and doing injury to its creditors; that in other ways the said litigation will hinder and delay the due and complete administration of the estate pursuant to the provision of the bankruptcy law.

That said suit is not founded upon liability for obtaining property by false pretenses or false representations or for wilful or malicious injury to
54 the person or property of another, nor upon any of the other liabilities set forth in Section 17 of the Bankruptcy Law from which a discharge in bankruptcy would not be a release.

That no previous or other application has been made to this or any other court for the stay herein asked.

Wherefore your petitioner prays for an order to show cause why further proceedings in the suit should not be stayed for the time prescribed in Section 11-a of said Bankruptcy Law, in particular for twelve months after the date of adjudication in

bankruptcy herein, unless the bankrupt shall previous to that time apply for its discharge, and then until the question of such discharge shall be determined, and for such other and further order as may be just and lawful. 55

Dated New York, May 31, 1907.

T. TILESTON WELLS,
Petitioner.

STATE OF NEW YORK,
County of New York, } ss.:
City of New York,

56

I, T. TILESTON WELLS, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information and belief.

T. TILESTON WELLS.

Subscribed and sworn to before me
this 31st day of May, 1907.

ROBERT GERBRACHT,
[NOTARIAL SEAL.] Notary Public,
Kings Co. No. 105.
Certificate filed in New York Co.

57

58 **Exhibit E—Order Staying Prosecution of Action Brought by Mary Hatch Riggs.**

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms thereof, in the Post Office Building, in the Borough of Manhattan, in said District, on the 15th day of October, 1907.

Present—Hon. GEORGE C. HOLT, District Judge.

59

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Bankrupt.	In Bankruptcy No. 9835.

On the order to show cause, dated the 31st day of May, 1907, granted upon the petition of T. Tileston Wells, the Receiver herein, bearing date the same day, why an order should not be made re-

60 straining Mary Hatch Riggs, as administratrix of the goods, chattels and credits of Clarence B. Riggs, deceased, and her attorneys, and each of them, from further prosecuting the suit now pending in the Supreme Court of the State of New York for the County of Kings, against the bankrupt herein, in which said administratrix is plaintiff and said New York Tunnel Company is defendant, until twelve months after the date of adjudication of bankruptcy herein, unless the bankrupt shall previous to that time apply for its discharge, and then until the question of such discharge shall be determined;

Now, after reading said order to show cause and said petition, with proof of service thereof, and after hearing S. Stanwood Menken, Esq., of counsel for the Receiver, in support of said motion, and Don R. Almy, Esq., attorney for said Mary Hatch Riggs, as administratrix, etc., in opposition thereto, it is 61

Ordered, that said Mary Hatch Riggs, as administratrix of the goods, chattels and credits of Clarence B. Riggs, deceased, and her attorneys, and each of them, be and they hereby are enjoined and restrained from further prosecuting said suit now pending in the Supreme Court of the State of New York for the County of Queens, against the bankrupt herein, in which said administratrix is 62 plaintiff and the bankrupt herein, said New York Tunnel Company, is defendant, and in which action said Don R. Almy, Esq., of 68 William street Borough of Manhattan, New York City, is attorney of record for the plaintiff, until twelve months after adjudication of bankruptcy herein, unless the bankrupt shall previous to that time apply for its discharge, and then until the question of such discharge shall be determined; and it is further

Ordered that the matter of the liquidation of the claim of said Mary Hatch Riggs, said administratrix, be and it hereby is referred to Stanley W. Dexter, Esq., as Special Master, to hear such testimony as may be adduced by the said Mary Hatch Riggs, 63 as administratrix, and by the Trustee herein, to determine and liquidate the amount of said claim after the said Mary Hatch Riggs, as such administratrix, shall have filed her proof of a non-liquidated claim with said Stanley W. Dexter, Esq., as Referee, before whom this matter is now pending.

Enter,

GEO. C. HOLT,
U. S. D. J.

Filed October 15th, 1907.

64 **Exhibit F—Petition for Review of Order Staying Action Brought by Mary Hatch Riggs, as Administratrix, in the New York Supreme Court.**

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

IN THE MATTER

65 OF

THE NEW YORK TUNNEL COMPANY,
Alleged Bankrupt.

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petition of Genaro Tamburi, Administrator of the estate of Giovanni Tamburi, deceased, and
66 Mary Hatch Riggs, Administratrix of the estate of Clarence B. Riggs, deceased, respectfully shows to this Court:

I. That heretofore on the 23d day of May, 1907, Andrew D. Baird and others filed herein a petition praying for the adjudication in bankruptcy of the above named New York Tunnel Company, a corporation organized and existing under the laws of the State of New York, and that on the same day, upon petition, the Honorable George C. Holt, one of the Judges for the District Court for the South-

ern District of New York, made an order appointing T. Tileston Wells, Esq., receiver for said corporation. 67

II. That the petition seeking the New York Tunnel Company to be adjudicated a bankrupt showed upon the face thereof that the New York Tunnel Company was a corporation organized under the laws of the State of New York and "is engaged in the business of building and contracting," and said petition failed to show that the principal business of said corporation was trading, printing, publishing, mining, manufacturing, or a mercantile pursuit, and otherwise failed to confer jurisdiction upon the Court to adjudicate the New York Tunnel Company a bankrupt. 68

III. That prior to the adjudication herein and on May 23, 1907, William H. Clark, one of the creditors, joining in the original involuntary petition herein, filed a petition for a receiver and in said petition alleged and proved that the New York Tunnel Company "has a contract for the construction of the tunnel from New York to Brooklyn to be used for the purpose of a railroad between the Boroughs of Manhattan and Brooklyn."

Upon such petition for receiver and proof, and upon the consent of the New York Tunnel Company, an order was entered herein May 23, 1907, 69 by Honorable George C. Holt prior to the adjudication of the New York Tunnel Company to be a bankrupt, in which it was determined that T. Tilestone Wells, Esq., be appointed receiver, and among other things it was adjudicated, ordered and decreed:

"That said receiver be authorized in his discretion to continue the business of such bankrupt in constructing the tunnel now under construction running from Battery Park in the Borough of Man-

70 hattan under the East River to the Borough of Brooklyn."

IV. That on May 23, 1907, prior to the adjudication herein, T. Tileston Wells, Esq., filed his petition and affidavit for the appointment of his attorneys as receiver and presented the same to Honorable George C. Holt, Judge U. S. Dist. Ct., and it was therein alleged and proved:

"That your petitioner is informed and believes, that one of the largest assets of the said New York Tunnel Company is a certain contract which said company has for the construction of the tunnel from New York to Brooklyn to be used for the pur-
71 pose of a railroad between New York and Brooklyn."

V. That on May 28, 1907, prior to the adjudication herein, T. Tileston Wells, Esq., receiver, applied for appointment of a consulting engineer, and in his petition and affidavit alleged and proved, and filed with Honorable George C. Holt, that

"The principal business of the said alleged bankrupt is the construction of the tunnel between New York and Brooklyn." "That in the course of the construction of said tunnel, it is necessary that your petitioner should have the aid, advice and as-
72 sistance of a competent and experienced engineer skilled in submarine tunnel construction who will assist and advise him in connection with the work of construction of said tunnel."

And upon such affidavit and proof and prior to the adjudication of the corporation to be a bankrupt, Honorable George C. Holt decreed that:

"It satisfactorily appears that said Receiver is conducting the business of said New York Tunnel Company and it satisfactorily appears that said

Receiver requires the advice of a competent engi- 73
neer skilled in submarine tunnel construction and
the services of an auditor."

VI. That on May 29, 1907, Honorable George C. Holt issued an order purporting to be an adjudication in bankruptcy of the New York Tunnel Company, a corporation, and referred the cause to Honorable Stanley W. Dexter, one of the Referees of the said Court.

VII. That on June 18, 1907, T. Tileston Wells, Esq., filed his petition and affidavit seeking leave to obtain liability insurance, and therein showed to Honorable George C. Holt that:

74

"Your petitioner was authorized to continue the business of the said bankrupt, which is that of constructing a tunnel between New York and Brooklyn." "That a large number of men are employed in said work of construction."

VIII. That on June 10, 1907, T. Tileston Wells, Esq., filed a petition and affidavit seeking leave to continue the business of the New York Tunnel Company, and therein showed to Honorable George C. Holt that:

"That your petitioner has investigated the affairs and assets of said bankrupt and has ascertained 75
that its chief asset consists in certain rights in a certain contract made between Andrew Onderdonk and the Rapid Transit Subway Construction Company dated December 19, 1902, and assigned to said bankrupt, wherein and whereby it was provided that said Onderdonk and his assigns should receive from said Subway Construction Company a certain sum for the construction of said tunnel under the East River and said Onderdonk undertook in behalf of himself and his assigns to construct said

76 tunnel in accordance with the plans referred to in said contract."

"That while your petitioner has been conducting the business of the bankrupt, said Subway Construction Company has been paying for the materials furnished and labor employed in the actual work of constructing said tunnel."

"Your petitioner has not space available to store the same without greatly hindering and impeding the work of construction of said tunnel."

And upon said affidavit and petition, Honorable George C. Holt decreed and ordered on June 10, 1907:

77 "Ordered that said Receiver be and hereby is authorized in his discretion to continue the business of such bankrupt in constructing the tunnel now under construction running from Battery Park in Manhattan under the East River to Brooklyn."

IX. That a certified copy of the certificate of incorporation of the New York Tunnel Company was filed with the Referee herein and that there is attached to this petition and marked "Exhibit A" a true and correct copy of said certificate of incorporation and to which reference is hereby made and the business for which the New York Tunnel Company was authorized by the said certificate of in-
78 corporation as therein shown.

X. That in the above described pleadings, orders, decrees and acts on the part of the Honorable George C. Holt, the principal business of the New York Tunnel Company has been herein adjudicated and recognized to have been that of the construction of a subaqueous tunnel under the East River between the Boroughs of Manhattan and Brooklyn, and it has been shown to this Honorable Court that the principal business of the New York Tunnel

Company prior to May 23, 1907, was not that of 79
manufacturing, printing, publishing, trading, mining or a mercantile pursuit, and that the United States District Court was without jurisdiction to adjudicate the New York Tunnel Company to be a bankrupt, and that the said Court is without jurisdiction to make any orders or to take any other proceedings in connection with the New York Tunnel Company.

XI. That upon information and belief there was commenced on about January 19th, 1907, in the Supreme Court of the State of New York for Kings County a suit in behalf of Mary Hatch Riggs, as Administratrix of the goods, chattels and credits of 80
Clarence B. Riggs, deceased, as plaintiff against the New York Tunnel Company as defendant, and a copy of the complaint in the said action is hereto attached and marked "Exhibit B" and referred for its contents and effect as if fully set forth herein, and that said cause of action arose out of the negligence, carelessness and mismanagement of the defendant New York Tunnel Company, its agents, servants and employees, and was an action for damages commonly known as an action arising out of tort, and not an action arising out of contract.

XII. That upon information and belief, there was commenced on about October 6th, 1907, by Gennaro 81
Tamburi as Administrator of the goods, chattels, etc., of Giovanni Tamburi, deceased, as plaintiff in the Supreme Court of the State of New York, an action against the New York Tunnel Company as defendant, and that a copy of the complaint in the said action is hereto attached marked "Exhibit C" and referred to for its contents and effect as if fully set forth herein. That this cause of action was likewise an action arising out of the negligence of the New York Tunnel Company, its agents and

82 servants, and was and is a tort action and not an action arising out of contract.

XIII. That the case of Mary Hatch Riggs was advanced and preferred on the calendar in the State Court, and was ready for trial on the 21st day of May, 1907, and the case of Tamburi against the New York Tunnel Company was placed on the October Calendar of the Supreme Court of New York County and was ready for trial.

XIV. That on the 31st day of May, 1907, the Honorable George C. Holt, upon the petition of T. Tileston Wells, Receiver for the New York Tunnel Company, granted an order to show cause why said
83 Mary Hatch Riggs as Administratrix and her attorneys should not be restrained from prosecuting the suit pending in the Kings County Supreme Court against the New York Tunnel Company. That thereafter counsel for Mary Hatch Riggs as Administratrix were heard by Honorable George C. Holt, when objections were made that the United States District Court herein was without authority and jurisdiction to make an order restraining the prosecution of the said suit, and it was then shown that the claim of the said Estate was one arising out of tort and not out of contract, and was not a provable claim under the Bankruptcy Act of 1898
84 as amended, and that the making of such an order would seriously injure and jeopardize the rights of the said Estate, but that notwithstanding the said objections, there was made and entered by the Honorable George C. Holt upon the application of the said T. Tileston Wells, as Receiver and Trustee, on October 15th, the following order:

> "Ordered, that said Mary Hatch Riggs, as Administratrix of the goods, chattels and credits of Clarence B. Riggs, deceased, and her attorneys and each of them, be and they hereby are

enjoined and restrained from further prosecuting said suit now pending in the Supreme Court of the State of New York for the County of Kings, against the bankrupt herein, in which said Administratrix is plaintiff and the bankrupt herein, said New York Tunnel Company, is defendant, and in which action said Don R. Almy, Esq., of 68 William Street, Borough of Manhattan, New York City, is attorney of record for the plaintiff, until twelve months after adjudication of bankruptcy herein, unless the bankrupt shall previous to that time apply for its discharge, and then until the question of such discharge shall be determined; and it is further 85 86

Ordered that the matter of the liquidation of the claim of said Mary Hatch Riggs, said Administratrix, be and it is hereby referred to Stanley W. Dexter, Esq., as Special Master, to hear such testimony as may be adduced by the said Mary Hatch Riggs as Administratrix, and by the Trustee herein, to determine and liquidate the amount of said claim after the said Mary Hatch Riggs, as such Administrator, shall have filed her proof of a non-liquidated claim with said Stanley W. Dexter, Esq., as Referee, before whom this matter is now pending." 87

XV. That within ten days after the making and entering of this order, application was made to Honorable George C. Holt, Judge United States District Court, under Rule 38 of the Circuit Court of Appeals, and it was thereupon

"Ordered that the time within which the petition for review under Section 24B of the Bankruptcy Act of 1898 as amended from the order

88 of this Court, restraining Mary Hatch Riggs and her attorneys from prosecuting the tort claim of this Estate be enlarged and extended for the period of twenty days next following this 25th day of October, 1907, under Rule 38 of the Circuit Court of Appeals for this District."

XVI. That on October 15th, 1907, T. Tileston Wells, as Trustee for the New York Tunnel Company, filed his petition asking for a revision of an order made and entered by Honorable Stanley W. Dexter, Referee, on the 7th day of October, 1907, providing among other things that Gennaro Tam-
89 buri as Administrator may liquidate his claim in the Supreme Court of the State of New York and prosecute the same to judgment, and upon the said petition a hearing was had, and the following order was made and entered by the Honorable George C. Holt on November 1st, 1907:

"Ordered that Gennaro Tamburi, as Administrator of the goods, chattels and credits of Giovanni Tamburi, deceased, and his attorneys and each of them be and they hereby are enjoined and restrained from further prosecuting said suit now pending in the Supreme Court of the State of New York, for the County of
90 New York, against the bankrupt herein, in which said Administrator is plaintiff and the bankrupt herein, said New York Tunnel Company, is defendant, and in which action said Gilbert Ray Hawes, Esq., of 120 Broadway, Borough of Manhattan, New York City, is attorney of record for the plaintiff, until twelve months after adjudication of bankruptcy herein, unless the bankrupt shall previous to that time apply for its discharge, and then until the

question of such discharge be determined; and it is further 91

Ordered that the matter of the liquidation of the claim of said Gennaro Tamburi, as said Administrator, be and it is hereby referred to Stanley W. Dexter, Esq., as Special Master, to hear such testimony as may be adduced by the said Gennaro Tamburi as Administrator and by the Trustee herein, to determine and liquidate the amount of said claim after the said Gennaro Tamburi as such Administrator shall have filed his proof of an unliquidated claim with Stanley W. Dexter, Esq., as Referee, before whom this matter is now pending."

92

XVII. A. That prior to the entry of the said order, there was called to the attention of the Honorable George C. Holt the various pleadings and adjudications where the principal business of the New York Tunnel Company had been admitted to be that of constructing the subaqueous tunnel from the Boroughs of Manhattan to Brooklyn, and as ground of objection for the entry of the said order was assigned that the petition of the creditors seeking to have the New York Tunnel Company adjudged a bankrupt corporation disclosed upon the face thereof that for a period of six months prior to the adjudication had been engaged principally in the business of "building and contracting" and that said petition failed to show that the said corporation was principally engaged in the business of manufacturing, trading, printing, publishing, mining or mercantile pursuits, and said petition failed to allege that the said corporation was such as could be adjudged bankrupt under Section 4B of the Bankruptcy Act of 1898 as amended, and said petition failed to show sufficient jurisdictional facts to warrant the intervention of the United States District Court therein. 93

94 B. It was further shown to the said Honorable George C. Holt that the said cause of action arose out of a tort and not out of a contract, and was an unliquidated claim for the proof of which no provision was made in the Bankruptcy Act of 1898 as amended.

XVIII. That petitioners are advised and believe that the Honorable George C. Holt erred in making said order of October 15th, 1907, and November 1st, 1907, thereby restraining Mary Hatch Riggs as Administratrix and Gennaro Tamburi as Administrator and their attorneys from further prosecuting their actions in the Supreme Court of
95 the State of New York until twelve months after adjudication in Bankruptcy herein, unless the bankrupt shall previous to that time apply for its discharge, and then until the question of such discharge shall be determined; and also erred in directing that the matter of the liquidation of the claim of Gennaro Tamburi as administrator and the claim of Mary Hatch Riggs as administratrix should be referred to Honorable Stanley W. Dexter as special master to determine and liquidate the amounts of the said claims after the said claimants shall have filed their proofs of unliquidated claims with said Stanley W. Dexter, as referee, in
96 the following respects: (a) The said District Court was without jurisdiction to make the said orders granting the said injunctions. (b) The facts before the said Court were insufficient to warrant it in granting said injunction. (c) That the Court erred as a matter of law in restraining the prosecution of the said suits in the Supreme Court of the State of New York. (d) The Court erred as a matter of law in directing that the claims arising out of tort and not out of contract should be liquidated and proved in bankruptcy.

(e) The Court erred as a matter of law in directing that the claims of the Tamburi Estate and the Riggs Estate be liquidated and determined before the Honorable Stanley W. Dexter, as special master. (f) The Court erred as a matter of law in denying to the Riggs Estate and the Tamburi Estate the right to a jury trial in the liquidation of their tort claims against the New York Tunnel Company. (g) The Court erred in taking jurisdiction over the New York Tunnel Company and in issuing its order whereby the New York Tunnel Company was declared to be a bankrupt, and in referring the same to the Referee. 97

Wherefore your petitioners pray that the said orders of the Honorable George C. Holt, Judge of the United States District Court, be reviewed by this Court and the same be reversed and vacated and in all respects set aside, and that it be decreed by this Court that the said District Court was without jurisdiction to make the said orders of October 15th and November 1st granting an injunction, and erred as a matter of law in directing the determining and liquidation of the claims of the Tamburi Estate and the Riggs Estate before Honorable Stanley W. Dexter, as Special Master, and that the Court erred in denying the said estates the right to proceed in the Supreme Court of the State of New York with the prosecution and liquidation of their claims against the New York Tunnel Company, and your petitioners affirmatively pray that they be permitted to proceed in the Supreme Court of the State of New York with their actions against the New York Tunnel Company without stay or hindrance from the United States District Court, and for such other and further relief as to this Court may seem just and proper. 98 99

For all of which your petitioners will ever pray.

HAWES & CATCHINGS,
Special Counsel for Mary Hatch Riggs, Administratrix, and Attorneys for Gennaro Tamburi, Administrator,
Office and Post Office Address,
120 Broadway,
Borough of Manhattan,
City of New York.

STATE OF NEW YORK, }
County of New York, } ss.:

BENJAMIN S. CATCHINGS, being duly sworn, deposes and says: That he is one of the attorneys for the petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

The reason why this verification is not made by the petitioners is that Mary Hatch Riggs is not within the County of New York, and that the matters and effect stated in the said petition are peculiarly within the knowledge of counsel for the said petitioners.

BENJ. S. CATCHINGS.

Sworn to before me this 9th day of November, 1907.

WM. E. CONLEY,
(Seal.) Notary Public,
N. Y. Co.

Exhibit Attached to Foregoing Petition for Review. 103

MINUTE BOOK—NEW YORK TUNNEL COMPANY.

Page 39.

We, HERBERT P. BROWN, HAROLD NATHAN, CLARENCE S. BROWN and SHERLEY ONDERDONK, all of the City of New York, and JOHN D. MACLENNAN, of Cleveland, Ohio, being the undersigned, propose to form a corporation under and pursuant to the terms of the business corporations law of the State of New York and hereby certify as follows:

1. The name of said corporation is the NEW YORK TUNNEL COMPANY. 104

2. The purposes for which said corporation is formed is to construct, equip and maintain a tunnel or tunnels under the East River or Bay of New York from Battery Park, in the Borough of Manhattan, City of New York, to Clinton street, in the Borough of Brooklyn, City of New York, or from such other point in the Borough of Brooklyn as may be convenient or desirable to construct, equip and maintain a loop or tunnel in connection with the tunnel or subway constructed or to be constructed by the "Rapid Transit Subway Construction Company" at Battery Park, in the Borough of Manhattan, City of New York, or at such other point in said Borough as may be convenient or desirable to make, construct, equip and maintain such entrances, approaches, exits bridges, buildings, structures excavations, and other works as may be necessary, convenient or desirable in connection with said tunnels or loop or to carry on the business of this corporation; to purchase as otherwise acquire any contracts of concessions for or in relation to the construction, excavation or equipment of said tunnels or loop or works incident to the proper construction thereof. 105

106 3. The amount of the capital stock is two hundred and fifty thousand dollars.

4. The capital stock shall be divided into twenty-five hundred shares of one hundred dollars each. Said corporation will begin business with an amount of capital of sixty-two thousand five hundred dollars.

5. The principal business office of said corporation shall be and is located in the City of New York.

6. The duration of said corporation shall be ten years.

107 7. The number of its directors shall be five.

8. The names and post office addresses of its directors for the first year are as follows:

Herbert P. Brown, New York City.
Sherley Onderdonk, New York City.
Clarence S. Brown, New York City.
Harold Nathan, New York City.
Jno. D. Maclennan, Cleveland, Ohio.

9. The names and post office addresses of the subscribers of the certificate and a statement of the number of shares of stock which each agree to take in the corporation:

108 Herbert P. Brown, New York City, 500 shares.
Sherley Onderdonk, New York City, 250 shares.
Harold Nathan, New York City, 250 shares.
Clarence S. Brown, New York City, 250 shares.
John D. Maclennan, Cleveland, Ohio, 1,250 shares.

Witness our hands and seals this 17th day of December, 1902.

HERBERT P. BROWN, [L. S.]
SHERLEY ONDERDONK, [L. S.]
HAROLD NATHAN, [L. S.]
CLARENCE S. BROWN, [L. S.]
JOHN D. MACLENNAN, [L. S.]

STATE OF NEW YORK, }
County of New York, } ss.: 109

On this 17th day of December, 1902, personally appeared Herbert P. Brown, Sherley Onderdonk, Harold Nathan, Clarence S. Brown and John D. Maclennan, each to me personally known and each known to me to be one of the persons described in and who executed the foregoing instrument, and each acknowledged to me that he executed the same.

ROBERT G. S. CARCORAN,
Notary Public, Kings Co.
Certificate filed in N. Y. Co.

110

STATE OF NEW YORK,
Office of the Secretary of State, } ss.:

I have compared the preceding with the original amended certificate of incorporation of

NEW YORK TUNNEL COMPANY,

filed and recorded in this office on the 6th day of January, 1903, and do hereby certify the same to be a correct transcript therefrom and the whole of said original.

Witness my hand and seal of office of the Secretary of State, at the City of Albany, this 6th day of January, one thousand nine hundred and three. 111

J. B. W. MONGIN,
Deputy Secretary of State.

STATE OF N. Y.
Secty. of State
SEAL

112 **Exhibit Attached to Foregoing Petition for Review.**

SUPREME COURT,

KINGS COUNTY.

MARY HATCH RIGGS, as Administratrix of the goods, chattels and credits of Clarence B. Riggs, deceased,

Plaintiff,

113 vs.

NEW YORK TUNNEL COMPANY,

Defendant.

The plaintiff, complaining of the defendant, for a cause of action alleges:

FIRST.—That on or about the 2d day of January, 1907, the plaintiff was duly appointed administratrix of the goods, chattels and credits which were of Clarence B. Riggs, deceased, by a Surrogate of
114 the County of New York, in the Surrogate's Court of said County, and that she has duly qualified and is acting as such administratrix.

SECOND.—That upon information and belief, the defendant at and during all the times herein mentioned was a domestic corporation organized and existing under and by virtue of the laws of the State of New York, and was engaged in the business, among other things, of doing certain work, labor and services in connection with the tunnel

then in course of construction under the East River from the Battery, in the Borough of Manhattan, City, County and State of New York, to about Joralemon street, in the Borough of Brooklyn, County of Kings, and State of New York, and in connection with said work, labor and services employed certain agents, servants and employees, among whom was one certain John Ritchie, who was employed by the defendant as foreman. 115

THIRD.—That upon information and belief, on or about the 30th day of September, 1906, while the plaintiff's intestate was lawfully in and about the tunnel aforesaid and at a point therein about thirteen hundred feet from the bulkhead at Joralemon street, in the Borough of Brooklyn, aforesaid, he was violently thrown down and precipitated on to the floor of the said tunnel and hit by flying rock, earth and material, by reason of a certain explosion which then and there occurred, without any fault upon his part, but solely through the negligence, carelessness and mismanagement of the defendant, its agent, servants and employees, and thereby the plaintiff's intestate received injuries from which he died on or about the 14th day of October, 1906. 116

FOURTH.—That the said Clarence B. Riggs left him surviving his widow, Mary Hatch Riggs, the plaintiff herein, and Homer Riggs and Clarence B. Riggs his sons, who are the only heirs at law and next of kin of the said decedent and who have expended money for funeral expenses and have otherwise suffered damages as a result of the premises to the extent of fifty thousand dollars ($50,000). 117

Wherefore, the plaintiff demands judgment against the defendant in the sum of fifty thousand dollars ($50,000), together with interest thereon

118 from the 14th day of October, 1906, together with costs and disbursements of this action.

DON R. ALMY,
Attorney for Plaintiff,
68 William Street,
Manhattan,
N. Y. City.

Verified January 19th, 1907.

Exhibit Attached to Foregoing Petition for Review.

119 SUPREME COURT,

NEW YORK COUNTY.

GENNARO TAMBURI, as Administrator of the goods, chattels and credits of Giovanni Tamburi, deceased,

Plaintiff,

vs.

120 NEW YORK TUNNEL COMPANY,

Defendant.

The plaintiff, by Hawes & Judge, his attorneys, complaining of the defendant, respectfully shows to this Court:

I. That heretofore and on or about the 20th day of September, 1904, Giovanni Tamburi departed this life intestate, in the Borough of Manhattan, City of New York. That thereafter and

on or about the 3d day of October, 1904, plaintiff was duly appointed administrator of the goods, chattels and credits of said decedent, and thereupon letters of administration were duly issued and granted to plaintiff by the Surrogate of the County of New York, where said decedent lived at the time of his death; that plaintiff thereupon duly qualified as such administrator, and said letters are still in force; that said decedent left surviving him Andrea Tamburi, his father; Maria Tamburi, his mother; Pietro Tamburi and Gennaro Tamburi, brothers, and Dominica and Francesca Tamburi, sisters, as only next of kin. 121

II. Upon information and belief that at and during all the times mentioned herein, defendant was and still is a domestic corporation organized and existing under and by virtue of the laws of the State of New York, and on said 20th day of September, 1904, was engaged in the building and construction of a part of what is known as the "New York Subway," in "Battery Park," Borough of Manhattan, City of New York. 122

III. That on said 20th day of September, 1904, plaintiff's intestate while in the employ of the defendant was killed, through the negligence and carelessness of the defendant, its agents and servants, as hereinafter set forth.

123

IV. That it was the duty of the defendant at all times to provide plaintiff's intestate with a safe and suitable place in which to work, to employ competent and skilful employees and assistants and to maintain its ways, works and machinery in a safe and proper condition and to keep the same in a state of good repair.

V. Upon information and belief that said defendant in the course of its business, maintained

and operated certain apparatus which was used for hoisting earth and rock from the excavation of said "Battery Park," which said apparatus was in charge of and under the direction and control of a superintendent employed by defendant. That said apparatus consisted of a large wooden tower, from which were suspended numerous stationary cables passing directly over said excavation; conveyors were attached to said stationary cables and by means of movable cables operated by a compressed air engine, said conveyors were lowered and raised into and from said excavation and drawn along said stationary cables to the street. That it was the duty of said defendant, its agents and servants to keep the space through which said carrier passed while being lowered and raised, free from all obstruction, and to keep said wooden tower and the anchorage of said stationary cables sufficiently braced in order to withstand the maximum amount of weight attached to said cables, and sufficient to withstand the maximum power applied to said cables by said compressed air engine, but the said defendant, unmindful of its duty to the plaintiff's intestate, negligently and carelessly permitted said carrier to be raised and lowered between timbers which were stretched across said excavation, which said timbers obstructed the passage of said carrier, and in consequence of the unsafe, dangerous and defective condition of said apparatus, and because said wooden tower and the anchorage of said stationary cables were not sufficiently braced and were not sufficiently strong to withstand the force of said obstruction, and on account of the dangerous and unskilful manner in which said apparatus was operated, the same gave way and plaintiff was precipitated into said excavation and received violent and severe injuries, as a result of which he died.

VI. That thereafter and on or about the 6th day of October, 1904, plaintiff caused a notice to be served upon the defendant herein, in pursuance of Chapter 600 of the Laws of 1902, which said notice set forth the time, place and cause of said injuries, which resulted in the death of plaintiff's intestate. 127

VII. That by reason of the premises, plaintiff has been damaged in the sum of Fifty thousand ($50,000) dollars.

Wherefore, plaintiff demands judgment against the defendant for the sum of Fifty thousand ($50,000) dollars, together with the costs and disbursements of this action.

128

HAWES & JUDGE,
Attorneys for Plaintiff,
Office and Post Office Address,
120 Broadway,
Borough of Manhattan,
City of New York.

Verified October 6th, 1904.

129

130 **Exhibit G—Opinion of Noyes, J., on Review of Order Staying Prosecution of Tort Actions Brought by Mary Hatch Riggs et al.**

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

Before—LACOMBE, WARD & NOYES, Circuit Judges.

131 IN THE MATTER

OF

NEW YORK TUNNEL COMPANY, Mary Hatch Riggs, Admx., and Genaro Tamburi, Admr., Petitioners.

Petition to review two bankruptcy orders of the District Court, Southern District of New York. The first order, dated October 15, 1907, enjoins
132 Mary Hatch Riggs, administratrix, from prosecuting an action pending in a state court against the alleged bankrupt to recover damages for negligence causing the death of her intestate, and referring her claim to a special master for liquidation and determination. The second order, dated November 1, 1907, contains a similar restraining and reference order with respect to a similar claim of Genaro Tamburi, Administrator. The administratrix and administrator are the present petitioners.

NOYES, Circuit Judge.

133

The question in this case is whether unliquidated claims, like the petitioners' demands, founded upon torts are provable against a bankrupt estate.

Section 11a of the bankrupt law provides:

> "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person 134
> applies for a discharge, then until the question of such discharge is determined."

Thus the Act only authorizes the restraining of suits founded upon claims "from which a discharge would be a release." But unless a claim is provable against a bankrupt estate, it is not discharged and, consequently, is not subject to the control of the bankruptcy court.

Paragraph *a* of Section 63 enumerates the debts of the bankrupt which may be proved against his estate. It includes debts founded upon (1) judgments and written instruments; (2 and 3) taxation of costs; (4) open accounts or express or implied 135
contracts; (5) certain judgments rendered subsequent to bankruptcy. This paragraph manifestly does not include liabilities for torts.

Paragraph *b* provides:

> "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

136 This paragraph evidently relates to procedure. It provides for the liquidation of such of the claims enumerated in the preceding paragraph, *e. g.* for breach of contract, as might require such process. The one paragraph particularly enumerating the debts which are provable, we see no ground for holding that the other opens the door to unliquidated demands of every nature. Moreover any question about it seems to be settled by the decision in Dunbar v. Dunbar, 190 U. S. 350:

> "In section 63b provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court
137 in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph b, however, adds nothing to the class of debts which might be proved under paragraph a of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63a, to be liquidated as the court should direct."

While the Supreme Court in the later case of Crawford v. Burke, 195 U. S. 187, stated that another construction of the paragraph was possible, we do not understand that they adopted it.

It is urged, however, that a different construc-
138 tion should be adopted in view of an amendment to section 17—relating to discharges—adopted in 1903. This section as originally adopted provided as follows:

> "A discharge in bankruptcy shall release the bankrupt from all of his provable debts except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses, or false representations, or for wilful and malicious injuries to the property or person of another * * *."

Judgments rendered before bankruptcy whether based upon liability for tort or contract are expressly provable under section 63a. The exception in section 17 was to prevent judgments for certain torts being discharged. 139

In 1903 section 17 was amended in various ways. One change was the substitution of the word "liabilities" in place of the word "judgments." And the provision as it now stands affords some basis for the claim that the exception from the operation of the discharge of particular liabilities for tort implies that such liabilities in general are not discharged. But this implication does not carry far. The amendment was to an exception in the discharge statute, which states what debts shall not be discharged rather than what shall be. A negative provision that liabilities for certain torts shall not be discharged, does not, of itself, make all other tort liabilities provable debts. 140

It is apparent that Congress by the amendment intended to preclude the possibility of claims for certain torts being discharged, whether reduced to judgment or not. Having that object in view, it used language not wholly in harmony with the other sections of the Act. But we see nothing to indicate an intention to enlarge the classes of provable debts. Certainly no intention is evidenced to bring in claims for torts which were never provable under the earlier bankruptcy acts. 141

We therefore follow the very careful opinion of the Circuit Court of Appeals for the Third Circuit in Brown v. United Button Co., 149 Fed. 48 in holding that a claim for unliquidated damages founded upon tort is not provable in bankruptcy. The claims of the petitioners were of this nature, unaccompanied with contractural liability, and the District Court was without power to make the orders complained of. They should be set aside.

142 The petitioners also ask the Court to declare that the District Court had no jurisdiction of the whole bankruptcy proceedings because the corporation was not of the classes subject to be adjudicated bankrupts. But the petitioners have only petitioned this court to review the two restraining and reference orders. All they urged in the District Court upon the jurisdictional question was by way of objection to the granting of these orders. They sought to escape from the bankruptcy proceedings. Upon the record as it stands, we can do no more than let them go.

The orders of the District Court are reversed, with
143 costs.

144

Exhibit H—Order of District Court on Mandate of United States Circuit Court of Appeals on Appeal by Riggs et al.

145

At a Stated Term of the District Court of the United States, for the Southern District of New York, held at the Court Rooms thereof in the Post Office Building, in the Borough of Manhattan, in the said District, on the 28th day of February, 1908.

Present—Hon. GEORGE C. HOLT.

146

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Alleged Bankrupt.	In Bankruptcy No. 9835.

Upon reading and filing the orders of the Court herein, dated October 15, 1907, and November 1, 1907, together with certain papers and records therein mentioned, and the mandate of the United States Circuit Court of Appeals being to the effect that said orders should be reversed,

147

Now, upon motion of Benjamin S. Catchings, of counsel for Gennaro Tamburi, administrator, and Mary Hatch Riggs, Administratrix, it is

Ordered, adjudged and decreed that the said orders made and entered herein on October 15 and

148 November 1, 1907, restraining the prosecution of the suit of Gennaro Tamburi, Administrator, and Mary Hatch Riggs, Administratrix, and directing the liquidation of said claims before a Special Master in Bankruptcy, be and the same are hereby in all respects reversed, set aside and vacated, and said suits are allowed to proceed; and it is

Ordered that T. Tileston Wells, Trustee for New York Tunnel Company, pay to Benjamin S. Catchings his costs in behalf of said claimants, amounting to Ninety-seven and 13/100 dollars ($97.13).

GEORGE C. HOLT,
Judge.

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EXHIBIT 1

Consisting of Notice of Motion, Affidavits and Exhibits on Motion to Set Aside Adjudication in Bankruptcy and Order Denying Motion.

UNITED STATES DISTRICT COURT, 151

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

NEW YORK TUNNEL CO.,
Alleged Bankrupt.

152

SIRS:

Please take notice that upon all the proceedings had herein and upon the affidavit of Benjamin S. Catchings and D. H. Allen, copies of which are hereto annexed, and the affidavit of Thomas C. McDonald, which has previously been served upon you, and all papers filed herein, the undersigned will move this Court, at a term thereof, to be held in and for the Southern District of New York, at the Post Office Building, in the Borough of Manhattan, City of New York, on Monday, May 11, at 10:30 a. m., or as soon thereafter as counsel can be heard for an order to vacate and set aside the adjudication entered herein on the 29th day of May, 1907, and for an order allowing creditors of the said alleged bankrupt to answer, plead, or demur to the petition of David H. Smith, Andrew D. Baird and William E. Clark, filed herein May 23, 1907, upon the ground that the said New York Tunnel Company is not such a corporation as can be adjudicated bankrupt under Section 4B of the United States

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Bankruptcy Statute of 1898, as amended, and that this Court has not jurisdiction herein, and for such other and further relief as to the Court may seem just in the premises.

This motion will then and there be made in behalf of Borne Scrymser Company, J. A. Beauregard, David Murphy, John Pridy, Richard Creedon, John Hughes, James H. Cooligan, William Fitzgerald, James Forbes, Mary Hatch Riggs, Admx., Philip Donovan, Ellen Stack, Admx., James Keane and James Kelly, all creditors of the New York Tunnel Company.

Yours, etc.,

BENJ. S. CATCHINGS,
Special Counsel.

UNITED STATES DISTRICT COURT, 157

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

NEW YORK TUNNEL COMPANY,
Alleged Bankrupt.

State of New York, } 158
County of New York, } ss.:

Benjamin S. Catchings, being duly sworn, says that he resides at the Holland House, City of New York, and,

1. That on or about May 23, 1907, a petition was filed, seeking to adjudicate the New York Tunnel Company a bankrupt, and that on or about May 29, 1907, a decree was entered herein by Honorable George W. Holt, upon the consent of the New York Tunnel Company, adjudicating the corporation a bankrupt. On June 3 deponent was retained by D. Allen's Sons Rope Company to represent them 159
against the New York Tunnel Company. Thereafter deponent conferred with counsel for other contract creditors, and noticed a motion for June 12, 1907, to vacate and set aside the said adjudication, which notice of motion is hereto attached and marked Exhibit A, and referred to for its contents and effect. That attached to this notice of motion was the affidavit of Darius H. Allen, sworn to and verified on June 11, 1907, the original of which is hereto attached and marked Exhibit B, and referred to for its contents and effect.

160 2. That this motion was made by D. Allen's Sons Rope Company in behalf of themselves and such other creditors as might thereafter join in the motion. That on June 5th, 6th, 8th, 10th and 11th deponent was in conference with other attorneys representing contract creditors.

That this notice of motion and affidavit was served upon Philbin, Beekman & Menkin, attorneys for T. Tileston Wells, receiver, and on attorneys for New York Tunnel Company, and petitioning creditors on June 12, 1907. That on or about June 12 or 13, 1907, deponent received an offer from a former representative of the New York Tunnel Company to buy the claim of D. Allen's Sons Rope Company,
161 conditioned upon his agreeing to refrain from prosecuting the motion to vacate the adjudication herein and to refrain from renewing the same in behalf of any other creditors. This deponent refused to do on the ground that the D. Allen's Sons Rope Company motion was made in behalf of the said company and other interests, and that they were interested therein, and they would first have to be satisfied that a withdrawal of the motion was for the best interest of the creditors of the New York Tunnel Company. Thereafter, on several occasions, informal meetings of creditors of the New York Tunnel Company were had in the Mutual Life Building, at which meet-
162 ings it was earnestly urged by Mr. Menkin, of the firm of Philben, Beekman & Menkin, that it was for the best interests of the general creditors of the New York Tunnel Company that this motion to vacate this adjudication should be withdrawn or that it should be adjourned until after the completion of the construction of the tunnel between Brooklyn and the Battery in New York City. The principal ground of his argument was that the receiver which had actual possession of the tunnel and property of the New York Tunnel Company, had

entered into financial arrangements with the principal contractor and with August Belmont, whereby the money necessary to pay the weekly payrolls and for material and supplies would be paid directly by the said Belmont or Rapid Transit Subway Construction Company to the employees and creditors of the receiver, and that in this way the contract could be carried on to completion and that in form at least the receiver for the New York Tunnel Company would be enabled to complete the contract and avoid such claims for damages as the Subway Construction Company would have in the event we pressed this motion and caused the cancellation of the contract and failure to complete the tunnel. Added to this argument was the fact that the chief asset of the tunnel company consisted in the claim against the Subway Construction Company for payment for certain reconstruction work which was not contemplated in their original contract. This argument had such weight with the creditors who attended this meeting that they decided it was advisable to postpone from time to time the hearing on this motion until after the completion of the contract but that the motion should be kept alive to save such rights as the general creditors might wish to assert when the time arrived for a general distribution of the assets of the company. Upon the strength of this understanding the various contract creditors with claims far in excess of the total amount of claims heretofore filed in bankruptcy have refrained from filing their claims until after this motion is first tried and the jurisdiction of the Court settled. That after this conference and upon the earnest solicitation of Mr. Menkin in behalf of the petitioning creditors, the receivers, and speaking for the New York Tunnel Company whom he had represented immediately prior to bringing the petition, this motion was adjourned one week under

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166 stipulation, a copy of which is hereto attached marked Exhibit D and referred to and made a part of this affidavit for its contents and effect and that in the said stipulation it was specifically "stipulated that the said judgment shall be without prejudice to any rights D. Allen's Sons Rope Company have under said motion and the delay caused thereby shall not be considered laches on the part of said intervening creditors. That thereafter on about June 24, 1907, on July 2, 1907, on July 13, 1907, on Aug. 6, 1907, on Aug. 20, 1907, on September 17, 1907, on Oct. 14, 1907, on Nov. 29, 1907, on Jan. 3, 1908, on Feb. 11, 1908, on Mar. 14,
167 1908, on Mar. 20, 1908, similar stipulations were made and entered into between Philben, Beekman & Menkin, attorneys for T. Tileston Wells, trustee, and for the petitioning creditors, Garven, Armstrong & Conger, attorneys for the New York Tunnel Co., and deponent as attorney for D. Allen Sons Rope Company, in each of which stipulations it was agreed that the motion should be adjourned without prejudice for a time sufficient to cover the period between said stipulations. That on Mar. 20, 1908, the said motion was adjourned to Mar. 30, 1908, which last stipulation is hereto attached and marked Exhibit E, referred to and made a part hereof for its contents and effect. And thereafter
168 deponent received a telephone inquiry from the said Allen's Sons Rope Company in which they stated that they had received an offer from Mr. Chas. Evans to pay to them the amount of their claim against the New York Tunnel Company and they asked for instructions as to whether or not they had a legal right to accept this payment. Deponent advised D. Allen's Sons Rope Company that in his opinion the reason for the offer was that the New York Tunnel Company desired to prevent the question of jurisdiction in the bankruptcy court being

raised and that they had made the motion but they 169
would have to use their own judgment and discretion in the matter, and thereafter the deponent received a letter from the Allen's Sons Rope Company advising that on Mar. 24, 1908, a Mr. Chas. Evans of 458 West 27th St., New York City, had come to their office and paid them in cash $223.23 in settlement of their claims against the New York Tunnel Company.

Deponent is informed and believes that said Chas. Evans was at one time connected with the New York Tunnel Company and that this money was paid in their behalf for the purpose of preventing the general creditors of the New York Tunnel Com- 170
pany from prosecuting the question of the jurisdiction of the court over the said corporation.

3. That deponent consented to adjournments of D. Allen's Sons Rope Company's motion upon an additional ground, namely, that he had raised the question of the jurisdiction of the district court in answer to the order to show cause why his client Gernaro Tamburi should not be restrained from prosecuting his tort suit in the State court against the New York Tunnel Company and the question of the jurisdiction of the court therein was again urged before Hon. Geo. C. Holt as one of the reasons why the order of the Referee should not be affirmed and 171
was again raised as a ground for vacating the order of the court restraining Mary Hatch Riggs, administratrix from prosecuting her suit in the State court and at all times up and until the decision of the United States Circuit Court of Appeals for this district was handed down the deponent and the various contract creditors and other attorneys who have been working in conjunction with him in this matter believed the jurisdiction of the district court herein has constantly been under attack in this proceeding.

172 and by reason of the fact that the injunctions issued against the tort creditors allowed it preference on the calendar of the circuit court of appeals it was deemed more advisable to raise the jurisdictional question involved by assigning it as an objection to the order restraining tort creditors. And this question of the jurisdiction of the court has been diligently prosecuted until the said decision of the circuit court of appeals, when it was held that a motion to vacate the adjudication should be made directly to the court below, and they refused to pass upon the jurisdictional objection to the injunction in their decree.

It was not until the latter part of February or
173 the first of March that deponent realized that the district court and the circuit court of appeals would require the pressing of the motion before they would reconsider the jurisdictional objections which appeared on the face of the record and which had been pointed out at several hearings before the district court. Prior to this decision of the circuit court of appeals the district court held that tort claims were provable and allowable in bankruptcy and entitled to a share in the distribution of the estate, and it was not until after February that tort claimants of the New York Tunnel Company were finally adjudicated to have no rights to distribution in bank-
174 ruptcy. The objections to the administration of this estate in bankruptcy then became, and not until then, a vital question with these tort creditors, and the reason why they did not prosecute a motion in their own behalf prior to noticing the present motion was that the district court had ruled that they were entitled to prove and establish their claims in bankruptcy. The present motion papers in their behalf were verified as expeditiously as possible owing to the difficulty in reaching Mr. Kelly.

Wherefor the premises considered and for the purpose of carrying out the original understanding with the general creditors, D. Allen's Sons Rope Company, contract creditors, through their counsel, who is making this affidavit, joins in asking the court for such relief as the equity in this case demands, and, if necessary, for leave to prosecute the motion in behalf of the said creditors of the New York Tunnel Company. 175

The deponent is informed and believes that J. A. Beauregard has a suit and claim for $25,000.00; that David Murphy has a confessed judgment for $400.00, that John Pridy and Richard Creedon and John Hughes each have claims and suits for $10,000.00, that James E. Cooligan has a claim and suit for $20,000.00, that James Forbes has a claim and suit for $10,000.00, that Mary Hatch Riggs, Admx., has a judgment obtained in Kings County for $35,000.00, that Philip Donovan has a claim and suit for $10,000.00, that Ellen Stack, as Admx., has a claim and suit for $30,000.00, and that James Keane has a claim and suit for $60,000.00, all of which said claims founded in tort and in their behalf as counsel, deponent avers that they have been denied by the Circuit Court of Appeals right to establish their claims in bankruptcy by reason of the fact that their claims are founded in tort and that they were not completely advised of their standing until after the decision of the circuit court of appeals upon the application of Gernaro Tamburi and Mary Hatch Riggs, Admx., and that then join with James Kelly in asking relief for the adjudication herein. 176 177

3. The reason this affidavit is made by counsel and not by claimants is that the matters alleged are within the knowledge of counsel and not of claim-

178 ants, and the time is insufficient to secure their verification upon information and belief.

BENJ. S. CATCHINGS.
(Copy.)

Sworn to before me this 6th day of May, 1908.

THOS. M. APPLEGARTH,
[SEAL.] Notary Public,
N. Y. Co.
Reg. No. 2495.

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179 **Exhibit Annexed to Foregoing Affidavits.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL CO., 180 Alleged Bankrupt.	In Bankruptcy.

SIRS:

Please take notice that on all the proceedings had herein, and on the annexed affidavit of Darius H. Allen, verified the 11 day of June, 1907, the undersigned will move this Court at a term thereof to be held in and for the Southern District of New York

at the Post Office Building in the Borough of Manhattan, City of New York, on Monday, the 17th day of June, 1907, at 10 o'clock A. M., or as soon thereafter as counsel can be heard for an order vacating and setting aside and annulling all the acts, orders and decisions of this Court herein, including the order of adjudication entered herein on the 29th day of May, 1907, and the order appointing a receiver herein entered May 23, 1907, and the order of reference entered herein May 29th, 1907; and for an order allowing D. Allens Sons Rope Company, a corporation of the State of New York and a creditor of said alleged bankrupt or any other party in interest to Andrew D. Baird and William E. Clark filed herein May 23rd, 1907, on the ground that the said New York Tunnel Company is not such a corporation as can be adjudicated bankrupt under Section 43 of the United States Bankruptcy Statute of 1898 as amended, and that this court has not jurisdiction herein. And for such other and further relief as to the Court may seem just in the premises.

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Yours, etc.,

BENJ. S. CATCHINGS,
Attorney for D. Allens Sons
Rope Co.

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184 **Exhibit Annexed to Foregoing Affidavits.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, 185 Alleged Bankrupt.	In Bankruptcy.

STATE OF NEW YORK, County of Kings, } ss.:

DARIUS H. ALLEN, being duly sworn, says that he resides at 1302 Pacific St., Brooklyn, New York, and is treasurer of D. Allens Sons Rope Company, a Creditor of the said New York Tunnel Company.

I.—That D. Allens Sons Rope Company is a corporation of the State of New York, having its principal place of business at No. 388 Third Avenue, in 186 the Borough of Brooklyn, City of New York, and is a creditor of the said New York Tunnel Company for goods sold and delivered.

II.—That the New York Tunnel Company is a corporation of the State of New York, and as deponent is informed by his counsel and verily believes, said New York Tunnel Company was organized chiefly for the purpose of constructing, equipping and maintaining a tunnel or tunnels under the East River, between the Boroughs of Manhattan and Brooklyn, and that for six months prior to the

filing of the petition of bankruptcy herein, said corporation was principally engaged in the construction of said tunnel or tunnels, and said corporation is not authorized by its certificates of incorporation to engage, and has not been for six months prior to the filing of said petition in bankruptcy chiefly engaged in the business of Printing, Publishing, Trading, Mining, Manufacturing, nor in a mercantile business; that this court has no jurisdiction to adjudicate the said Tunnel Company a bankrupt, to appoint a receiver of said corporation or to do any other acts in connection with the Estate of said corporation. 187

III.—That deponent is informed by his counsel, and verily believes that the petition herein of Andrew D. Baird *et al.* to have the New York Tunnel Company declared bankrupt, filed herein May 23rd, 1907, discloses upon the face thereof that said corporation has been for six months prior thereto principally engaged in the business of Building and Contracting, and said petition fails to show that said corporation is such a corporation as could be declared bankrupt under Section 4B of the Bankruptcy Act of 1898 as amended; that said petition fails to show that said corporation is authorized to engage in the business of Building and Contracting; and said petition fails to show any jurisdiction in this court over the said alleged bankrupt. 188 189

IV.—That the petition of T. Tileston Wells, Esq., sworn and filed May 27th, 1907, states that said corporation is a corporation, and the "principal business of the alleged bankrupt is the Construction of the tunnel between New York and Brooklyn."

V.—That as deponent is informed by his counsel and verily believes, that this court has issued certain injunctions staying certain actions brought by

certain creditors against the New York Tunnel Co., and that D. Allen Sons Rope Co. is desirous of prosecuting its claim in the State Courts, if this Court is without jurisdiction, without stay from this court.

(Signed) DARIUS H. ALLEN.

Sworn and subscribed to before me this 11th day of June, 1907.

(Signed) CHAS. F. SWAN,
Notary Public,
Kings County.

Exhibit Annexed to Foregoing Notice of Motion and Affidavits.

Service of the annexed Notice of Motion for June 17th 1907 is hereby admitted this 12th day of June 1907.

(Signed) GARVEN, ARMSTRONG & CONGER,
40 Wall St.
Attorneys for New York Tunnel Company.

(Signed) PHILBIN, BEEKMAN & MENKIN,
Attorneys for T. Tileston Wells, Receiver, and for Andrew D. Baird, David H. Smith and William H. Clark, Petitioning Creditors.

Exhibit Annexed to Foregoing Notice of Motion and Affidavits. 193

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL CO., Alleged Bnkpt.	In Bankruptcy.

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It is hereby stipulated that the annexed motion of D. Allens Sons Rope Company noticed for Monday June 17th 1907 at 10 o'clock A. M. at the Post Office Building be adjourned to Monday June 24th at the same time and place.

It is further stipulated that the said adjournment shall be without prejudice to any rights D. Allens Sons Rope Company have under said motion and the delay caused thereby shall not be considered to be laches on the part of said intervening creditor.

PHILBIN, BEEKMAN & MENKIN
Attorneys for T. Tileston Wells, 195
Receiver, and for Andrew D. Baird, David H. Smith, and William H. Clark, Petitioning Creditors.

GARVEN, ARMSTRONG & CONGER,
Attorneys for New York Tunnel Company.

BENJ. S. CATCHINGS,
Attorney for D. Allens Sons Rope Company.

196 **Exhibit Annexed to Foregoing Notice of Motion and Affidavits.**

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, 197 Bankrupt.	In Bankruptcy. No. 9835.

It is hereby stipulated that the annexed motion of D. Allens Sons Rope Company, noticed for Monday, June 17, 1907, at 10 o'clock A. M., at the Post Office Building, and heretofore adjourned to the 23d day of March, 1908, be adjourned to the 30th day of March, 1908, at the same time and place.

It is further stipulated that the said adjournment shall be without prejudice to any rights which D. Allens Sons Rope Company may have under said motion, and the delay caused thereby shall not be 198 considered to be laches on the part of said intervening creditor.

Dated March 20, 1908.

PHILBIN, BEEKMAN & MENKIN,
Attorneys for T. Tileston Wells, Trustee, and for Andrew D. Baird, David H. Smith and William H. Clark, Petitioning Creditors.

GARVAN, ARMSTRONG & CONGER,
Attorneys for New York Tunnel Company. 199

BENJ. S. CATCHINGS,
Attorney for D. Allens Sons Rope Company.

Endorsed—Affidavit of Notice of Motion.—Filed May 11, 1908.

Notice of Motion Annexed to Foregoing Affidavits.

200

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL CO., Alleged Bankrupt.	In Bankruptcy

201

Sirs:

Please take notice that on all the proceedings had herein, and on the annexed affidavit of Thomas C. McDonald, verified the 23d day of April, 1908, the undersigned will move this Court at a term thereof to be held in and for the Southern District of New York, at the Post Office Building, in the Borough of Manhattan, City of New York, on Monday, April 27th, at 10.00 o'clock a. m., or as soon there-

202 after as counsel can be heard for an order vacating and setting aside and annulling all the acts, orders and decisions of this Court herein, including the order of adjudication entered herein on the 29th day of May, 1907, the order appointing a Receiver herein, entered May 23, 1907, and the order of reference entered herein May 29, 1907; and for an order allowing James Kelly, a creditor of said alleged bankrupt, or any other party in interest, to answer, plead or demur to the petition of David S. Smith, Andrew D. Baird and William H. Clark, filed herein May 23, 1907, on the ground that the said New York Tunnel Company is not such a corporation as can be adjudicated bankrupt under Section
203 4B of the United States Bankruptcy statute of 1898, as amended, and that this Court has no jurisdiction herein. And for such other and further relief as to the Court may seem just in the premises.

Yours, &c.,

BENJ. S. CATCHINGS,
Counsel.

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Affidavit Referred to in Foregoing Notice of Motion. 205

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Alleged Bankrupts.	In Bankruptcy 206

State of New York,
County of New York, } ss.:

Thomas C. McDonald, being duly sworn, says: That he is attorney for James Kelly, who is a creditor of the New York Tunnel Company, and has a judgment obtained in the Supreme Court of Kings County, New York, upon confession of New York Tunnel Co. for $9,000.00 for personal damages.

2d. On information and belief that the defendant was, at all times hereinafter mentioned, and is 207
a corporation, organized and existing under and by virtue of the laws of the State of New York—and having its principal office in the City of New York.

3d. On information and belief that defendant New York Tunnel Company was incorporated on or about Dec. 17th, 1902, and has been principaliy engaged in the construction of a subaqueous tunnel and its approaches between the Boroughs of Manhattan and Brooklyn in the City of New York,

208 and has at no time been principally engaged in a printing, publishing, trading, manufacturing, mining or a mercantile pursuit.

4th. That deponent is informed and believes that on May 23, 1907, Andrew D. Baird, David H. Smith and William H. Clark, creditors of the New York Tunnel Company, filed a petition in bankruptcy in the District Court of the Southern District of New York, in which petition it was alleged and proved that the defendant herein was a "a domestic corporation," and was "engaged in the business of building and contracting," and said petition failed to show that the principal business of
209 said corporation was "trading, printing, publishing, mining, manufacturing or a mercantile pursuit." That on said May 23, 1907, William H. Clark, one of the above-named petitioning creditors, filed a petitioner for a receiver, and in said petition alleged and proved that the New York Tunnel Company "has a contract for the construction of the tunnel from New York to Brooklyn, to be used for the purpose of a railroad between the boroughs of Manhattan and Brooklyn." Upon such petition for receiver and proof, and upon the consent of the New York Tunnel Company, an order was entered May 23, 1907, by Honorable GEORGE C. HOLT, prior to
210 the adjudication, if any, of the New York Tunnel Company to be a bankrupt, by which T. Tileston Wells, Esq., was appointed receiver, and, among other things, it was ordered:

> "That said receiver be authorized, in his dis-
> "cretion, to continue the business of such bank-
> "rupt in constructing the tunnel now under
> "construction running from Battery Park in
> "the Borough of Manhattan, under the East
> "River, to the Borough of Brooklyn."

That on May 23, 1907, T. Tileston Wells, Esq., filed his petition and affidavit for the appointment of his attorneys as receiver, and presented the same to Honorable George C. Holt, Judge U. S. Dist. Ct., and it was therein alleged and proved: 211

> "That your petitioner is informed and be-
> "lieves, that one of the largest assets of the
> "said New York Tunnel Company is a certain
> "contract which said company has for the con-
> "struction of the tunnel from New York to
> "Brooklyn, to be used for the purpose of a
> "railroad between New York and Brooklyn."

That on May 28, 1907, T. Tileston Wells, Esq., receiver, applied for appointment of a consulting engineer, and in his petition and affidavit alleged and proved, and filed with Honorable George C. Holt, that 212

> "The principal business of the said alleged
> "bankrupt is the construction of the tunnel
> "between New York and Brooklyn." "That
> "in the course of the construction of said tun-
> "nel, it is necessary that your petitioner should
> "have the aid, advice and assistance of a com-
> "petent and experienced engineer, skilled in
> "submarine tunnel construction, who will as-
> "sist and advise him in connection with the
> "work of construction of said tunnel." 213

And upon such affidavit and proof, and prior to the adjudication of the corporation to be a bankrupt, Honorable George C. Holt decreed that:

> "It satisfactorily appears that said Receiver
> "is conducting the business of said New York
> "Tunnel Company and it satisfactorily appears
> "that said Receiver requires the advice of a
> "competent engineer skilled in submarine tun-
> "nel construction of an auditor."

214 That on June 18, 1907, T. Tileston Wells, Esq., filed his petition and affidavit seeking leave to obtain liability insurance, and therein showed to Honorable George C. Holt that:

> "Your petitioner was authorized to continue "the business of the said bankrupt, which is "that of constructing a tunnel between New "York and Brooklyn." "That a large number "of men are employed in said work of con- "struction."

That on June 10, 1907, T. Tileston Wells, Esq., filed a petition and affidavit seeking leave to continue the business of the New York Tunnel Com-
215 pany, and therein showed to Honorable George C. Holt that:

> "That your petitioner has investigated the "affairs and assets of said bankrupt and has "ascertained that its chief asset consists in cer- "tain rights in a certain contract made between "Andrew Onderdonk and the Rapid Transit "Subway Construction Company dated Decem- "ber 19, 1902, and assigned to said bankrupt, "wherein and whereby it was provided that "said Onderdonk and his assigns should receive "from said Subway Construction Company a "certain sum for the construction of said tun-
> 216 "nel under the East River and said Onderdonk "undertook in behalf of himself and his assigns "to construct said tunnel in accordance with "the plans referred to in said contract."
>
> "That while your petitioner has been con- "ducting the business of the bankrupt, said "Subway Construction Company has been pay- "ing for the material furnished and labor em- "ployed in the actual work of constructing said "tunnel."

"Your petitioner has not space available to "store the same without greatly hindering and "impeding the work of construction of said "tunnel." 217

And upon said affidavit and petition, Honorable George C. Holt decreed and ordered on June 10, 1907:

"Ordered that said Receiver be and hereby is "authorized in his discretion to continue the "business of such bankrupt in constructing the "tunnel now under construction running from "Battery Park in Manhattan under the East "River to Brooklyn."

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That in the above described pleadings, orders, decrees and acts on the part of the Honorable George C. Holt, the principal business of the New York Tunnel Company has been herein adjudicated and recognized to have been that of the construction of a subaqueous tunnel under the East River between the Boroughs of Manhattan and Brooklyn, and it has been shown and proven before said Honorable Court that the principal business of the New York Tunnel Company prior to May 23, 1907, was not that of manufacturing, printing, publishing, trading, mining or a mercantile pursuit.

That your orators are informed and believe

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that among the debts and liabilities of defendant are some thirty claims for damages arising out of the construction of this Battery Tunnel whose claims total in the neighborhood of six hundred thousand ($600,000.00) dollars; that the Circuit Court of Appeals for the Southern District of New York has

decided such claims are not provable and allowable in bankruptcy, and should said corporation be permitted to remain in bankruptcy said claimants would have no participation in the assets of the said corporation. That deponent's judgment arises out of a tort claim.

THOMAS C. McDONALD.

Sworn and subscribed to before me this 23d day of April, 1908.

EDWD. J. STAPLETON,
(Seal.) Notary Public,
N. Y. County.

Filed May 11, 1908.—U. S. D. C., S. D. of N. Y.

Answering Affidavit of David L. Hough on Foregoing Notice of Motion. 223

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Bankrupt.	In Bankruptcy No. 9835.

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State of New York,
Southern District of New York, } ss.:
County of New York,

David L. Hough, being duly sworn, deposes and says:

That he resides in Borough of Manhattan, City of New York.

That on or about the month of June, 1905, he was elected president of New York Tunnel Company, the bankrupt above named, and has continued to act as such officer until the filing of the petition herein to have said company adjudged a bankrupt. That shortly after the filing of the petition affiant was employed by the Receiver herein as consulting engineer and upon the election of the Trustee was by him continued in such employment until the date of the verification of this affiadvit. That in connection with affiant's presidency of the bankrupt and such employment by the Trustee affiant has given con-

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226 stant personal attention to the practical details of and is familiar with the operations carried on by the bankrupt and the continuation of such operations by the Receiver and Trustee herein.

That as affiant is informed and verily believes on or about the 21st day of July, 1902, the City of New York acting by the Board of Rapid Transit Railroad Commissioners for the City of New York entered into a contract bearing date the same day with the Rapid Transit Subway Construction Company, hereinafter called the Construction Company, providing, among other things, that the Construction Company should construct an underground Rapid Transit Railroad consisting of a two track
227 line, commencing at a point near the intersection of Park Row and Broadway, in the Borough of Manhattan, City of New York, and running thence southerly under Broadway, Bowling Green, Battery Place, State Street and Battery Park with a loop under Battery Park and Whitehall Street, all of which is known as the Manhattan line. That said contract also provides that the Construction Company shall continue said railroad from a point immediately south of the station to be constructed under Bowling Green from a junction with the Manhattan Line a two-track line running under Battery Park and State Street, Whitehall Street,
228 South Street, Piers Nos. 2, 3 and 4; thence under the East River and under Piers Nos. 16 and 17 on the Brooklyn shore to Furman Street, and thence under Joralemon Street, Fulton Street and Flatbush Avenue to the intersection of Flatbush and Atlantic Avenues, in the Borough of Brooklyn, all of which is known as the Brooklyn line.

That on or about the 19th day of December, 1902, said Construction Company entered into a contract, hereinafter called the Loop contract, bearing date the same day, with one Andrew Onderdonk, wherein

it was provided, among other things, that said Onderdonk should construct that part of said Rapid Transit Railroad running to and around the loop before mentioned, including the station on the Loop line, a distance of about 2,060 feet; said Onderdonk to receive payment therefor at certain rates therein provided. That thereafter said Onderdonk assigned all his interest in said contract to the bankrupt herein. 229

That on or about the said 19th day of December, 1902, said Construction Company entered into a further contract, hereinafter called the Tunnel contract, bearing date the same day, with said Onderdonk, wherein it was provided, among other things, that said Onderdonk should construct that part of said Rapid Transit Railroad running from State Street, in the Borough of Manhattan under the East River and extending to a point designated as Station 106+86, being known as the East River tunnel and approaches, said Onderdonk to receive in payment therefor the sum of $4,035,000.00, together with an agreed rate of compensation for any work additional to that provided for in said contract. That thereafter said Onderdonk assigned all his interest in said contract to the bankrupt herein. 230

That preparatory to instituting work under these contracts, the bankrupt purchased and installed at a cost of about $200,000.00, plant and equipment consisting of engines, boilers, hoisting machinery, air-compressors, pumps, as well as portable machinery and various tools. That in addition two machine shops were fitted up. That considerable of this equipment was installed on permanent brick foundations, and an extensive system of pipes for carrying compressed air were installed. That wooden and sheet iron houses were erected for housing such equipment and for offices. That from time to time this equipment has been added to until at the time when the bankruptcy proceedings were instituted, 231

232 the plant of the company represented an investment of about $400,000.00. Part of this equipment was placed in Battery Park, in the Borough of Manhattan and the balance at the corner of Furman and Joralemon Streets, in the Borough of Brooklyn, offices being maintained by the company in both places.

That the work contracted for under both contracts may be classified as follows:

1. Excavation of earth and rock.
2. Removal of earth.
3. Backfilling.
4. Tunnelling and shafts.
233 5. Concrete masonry, including plastering or painting inside of tunnel walls.
6. Brick masonry, common.
7. Brick masonry, enameled.
8. Brick masonry, facing.
9. Brick masonry and brick laid in hot asphalt.
10. Cut stone masonry.
11. Pedestal masonry.
12. Furnishing and hauling from docks and erecting the iron and steel work in place and painting.
13. Sewers on and off the route of railroad; their manholes and connections.
14. Water, gas and other pipes, conduits, vaults,
234 subways.
15. Restoring street and park surfaces and repaving.
16. Maintenance of elevated and surface street railway tracks, electric and cable conduits, underpinning and support of monuments and buildings, docks, piers, pipes and other surface or subsurface structures.
17. Ducts and duct manholes and covers.

That without going into a detailed description of the work under the contract for the loop the nature

of the work may be generally described as, after proper excavation, the erection of a subsurface structure out of iron, steel, concrete, and masonry so joined together as to form a subsurface building suitable for the passing of trains through it and so formed as to be a unit capable of carrying the objects above it and upon the surface and of withstanding such lateral pressure as is imposed upon it. 235

That said contract further provided for the erection and construction of a station located upon the Loop line, except for the decoration of side walls and roof, installation of plumbing above the floor line of the station and the building of stairways, handrails, ticket offices, toilet rooms and fixtures, and the floor of such station. 236

That at the time when these proceedings in bankruptcy were instituted the work provided for under the Loop contract had been substantially completed.

That the work provided for under the Tunnel contract was of a nature somewhat different from that upon the Loop with one distinguishing feature. That the greater portion of the tunnel being under water, a different method of construction was adopted, consisting of running two parallel but independent tubes, each being designed for one track and of a size just sufficient to afford room for the passage of trains. That these tubes are formed of a series of cast iron rings bolted together, each ring being made up of a number of segments which when assembled and fastened together form a perfect circle. Later it was required that all joints should be calked and made watertight and that the tunnel was to be completely lined with concrete. 237

That at the time when bankruptcy proceedings were instituted the two tubes were completely erected and the joints were being calked. That at about that time, the plans were changed so as to

238 require the sinking of piles formed of steel and concrete, thereby delaying the work of concreting and ultimate completion of the tunnel. That such work has been carried on by the Receiver and Trustee and the Trustee has now practically completed the said contracts, except for the removal of the said plant, which is now being carried on.

That such processes as bolting of steel and iron material together, forming of concrete by mixing sand, water, broken stone and cement which forms a new physical combination, construction of masonry, painting of exposed surfaces of finished parts, forming of a waterproof lining throughout both the Tunnel and the Loop by the use of a num-
239 ber of successive layers of asphalt and of felt were necessary.

That said Loop and Tunnel contracts provide for the construction from the first excavation to the final step, before the laying of rails and installation of electrical equipment of subway structures which when the contracts are performed will be ready for the laying of rails and running of trains.

That during the prosecution of the work provided for in said Loop and Tunnel contracts, in addition to maintenance of its plant in working order and payment of wages of its laborers, running from $30,000 to $40,000 every two weeks, the
240 bills of the bankrupt for supplies used in the prosecution of said work have amounted to about $60,000 per month, rarely running below $20,000 per month. A large portion of these supplies were purchased on credit.

That hereunto annexed is a true copy of the amended certificate of incorporation of New York Tunnel Company, filed with the Secretary of State on the 6th day of January, 1903, and in the office of the Clerk of the County of New York on the 8th day of January, 1907.

That when the Receiver was appointed herein, it 241
was necessary for him to decide at once whether he should continue the said contract for the construction of the said tunnel for the following reasons:

That at said time, the work was at such a stage, that if the abnormal air pressure then maintained in the tunnel had been reduced to atmospheric pressure, the said tunnel would have been flooded with water with the result that it would have cost thousands of dollars to pump out the tunnel and restore it to the condition which it had been in. That to maintain such air pressure, required a considerable force of men and a large amount of coal for the engines operating the compressors. That it was, 242
therefore, incumbent upon the Receiver when he entered upon his duties to save loss to the estate either by notifying the said Construction Company to take over the contract and maintain the said air pressure or by himself continuing the contract to maintain such pressure in the course of completing said tunnel. That in deponent's opinion it was absolutely necessary that the Receiver should decide at the earliest moment which of the above courses of action he should pursue.

That as appears from the affidavit of T. Tileston Wells hereto annexed, the Receiver determined to continue the construction of said work. That said work has been continued from said 23d day of May, 243
1907, to the date hereof.

That a great amount of work has been performed by the Receiver and Trustee herein, consisting of inserting an interior lining of concrete in each tube of said tunnel, calking joints, etc., besides certain extra or additional work not prescribed in the general contract for construction, such as the placing of concrete piling under the tubes, the cutting or excavating of "cross-overs," which are connecting passages between the two tubes, etc.

244 That the statement of the claim of the Trustee for work done by the Receiver and Trustee is now being prepared under the direction of deponent. That deponent believes that there has been a considerable profit to the Trustee above the amount of the sums advanced to the Receiver and to the Trustee, which profit deponent estimates to amount at a minimum to $80,000.

D. L. HOUGH.

Subscribed and sworn to before me this 8th day of May, 1908.

E. S. RUE,
(Seal) Notary Public (98),
New York County.

245

We, Herbert P. Brown, Harold Nathan, Clarence S. Brown and Sherly Onderdonk, all of the City of New York, and John D. Maclennan, of Cleveland, Ohio, being the undersigned, propose to form a corporation under and pursuant to the terms of the Business Corporations law of the State of New York, and hereby certify as follows:

1. The name of said corporation is the "New York Tunnel Company."

246 2. The purposes for which said corporation is formed is to construct, equip and maintain a tunnel or tunnels under the East River or Bay of New York from Battery Park, in the Borough of Manhattan, City of New York, to Clinton Street, in the Borough of Brooklyn, City of New York, or from such other point in the Borough of Manhattan to such other point in the Borough of Brooklyn as may be convenient or desirable; to construct, equip and maintain a loop or tunnel to connect with the tunnel or subway constructed or to be constructed

by the "Rapid Transit Subway Construction Company" at Battery Park, in the Borough of Manhattan, City of New York, or at such other point in said Borough as may be convenient or desirable; to make, construct, equip and maintain such entrances, approaches, exits, bridges, buildings, structures, excavations and other works as may be necessary, convenient or desirable in connection with said tunnels or loop, or to carry on the business of this corporation; to purchase or otherwise acquire any contracts or concessions for or in relation to the constructions, execution or equipment of said tunnels or loop or works incident to the proper construction thereof. 247 248

3. The amount of the capital stock is Two hundred and fifty thousand ($250,000) dollars.

4. The capital stock shall be divided into twenty-five hundred shares of one hundred dollars each. Said corporation will begin business with an amount of capital of sixty-two thousand five hundred dollars.

5. The principal business office of said corporation shall be and is located in the City of New York.

6. The duration of said corporation shall be ten years. 249

7. The number of its directors shall be five.

8. The names and post-office addresses of its directors for the first year are as follows:

Herbert P. Brown, New York City.
Sherly Onderdonk, "
Harold Nathan, "
Clarence S. Brown, "
John D. Maclennan, Cleveland, Ohio.

9. The names and post-office addresses of the subscribers of the certificate and a statement of the number of shares of stock which each agree to take in the corporation.

Herbert P. Brown, N. Y. City, five hundred shares.

Sherly Onderdonk, N. Y. City, two hundred and fifty shares.

Harold Nathan, N. Y. City, two hundred and fifty shares.

Clarence S. Brown, N. Y. City, two hundred and fifty shares.

John D. Maclennan, Cleveland, Ohio, twelve hundred and fifty shares.

WITNESS our hands and seals this 17th day of December, in the year nineteen hundred and two.

HERBERT P. BROWN, [L. S.]
SHERLY ONDERDONK, [L. S.]
HAROLD NATHAN, [L. S.]
CLARENCE S. BROWN, [L. S.]
JOHN D. MACLENNAN, [L. S.]

State, City and County of New York, ss.:

On this 17th day of December, 1902, personally before me appeared Herbert P. Brown, Sherly Onderdonk, Harold Nathan, Clarence S. Brown and John D. Maclennan, each to me personally known and each known to me to be one of the persons described in and who executed the foregoing instrument and each acknowledged to me that he executed the same.

ROBERT E. S. CORCORAN,
(Seal.) Notary Public,
Kings Co.
Cert. filed N. Y. Co.

DISTRICT COURT OF THE UNITED STATES, 253

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Bankrupt.	In Bankruptcy. No. 9835.

254

STATE OF NEW YORK,
Southern District of New York,
County of New York. } ss.:

T. TILESTON WELLS, being duly sworn, deposes and says: That he is the Trustee herein. That heretofore and on or about the 23d day of May, 1907, deponent, by an order duly made herein on said day, was appointed receiver herein and qualified by filing the required bond; that deponent continued as receiver herein until the 24th day of June, 1907, when deponent was elected trustee herein and thereafter duly qualified by filing his bond, which was approved.

255

That as receiver, and later as trustee, deponent, pursuant to the authority duly granted, has carried on the business of the bankrupt herein, which consisted, among other things, in continuing the construction of the tunnel running from Battery Park in the Borough of Manhattan, to a point in Joralemon street in the Borough of Brooklyn; that the construction of the said tunnel is now practically completed, but that it remains for deponent as trustee herein to collect such sums as may be due upon the contract for the construction of said tunnel,

256 from the Rapid Transit Subway Construction Company, from which, as appears more fully from the affidavit of David L. Hough, hereto annexed, the bankrupt herein and deponent as its successor, are entitled to received under two certain contracts, certain sums for work performed upon said tunnel, and also upon a certain other section of the subway located in the Borough of Manhattan, known as the "loop."

That a large part of the assets of the estate consist of the claim against the said Rapid Transit Subway Construction Company. The only other assets, as appears from the schedules herein, are certain small accounts, most of which are collected, besides
257 the plant, tools and machinery which the bankrupt employed in the construction of said tunnel and said loop; that such plant, tools and machinery have been appraised and by the report of the appraisers, duly filed with the Referee herein, the same have been valued at about Eighty-seven thousand dollars ($87,000).

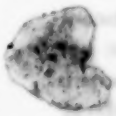
That the claim under the said contracts of the bankrupt consisted largely of amounts claimed to be due for additional work under such contract, which is in dispute, and by the provisions of the various contracts under which such claims have been made, the said Rapid Transit Subway Con-
258 struction Company must have the claims for such additional work allowed in favor of it as against the City of New York, with which the said Rapid Transit Subway Construction Company has a contract for the construction of the subway system, including such tunnel and such loop, before such claim for additional work can be recovered by the bankrupt or deponent as its successor.

That the net claim of the bankrupt against the said Rapid Transit Subway Construction Company at the time of the institution of the bankruptcy

proceedings herein, amounted to more than Two 259
million dollars ($2,000,000.00).

That the claim of the trustee for work performed by the receiver and the trustee herein (pursuant to authority duly given) after the institution of the bankruptcy proceedings, is now in course of preparation.

That as appears from the report of the deponent as receiver herein, on file with the Clerk of this Court, in "Schedule A," containing the engagements of the receiver, Benjamin S. Catchings, Esq., called upon deponent and had an interview with him on the 31st day of May, 1907, said Catchings stating that he was attorney for certain creditors, 260
and making an appointment to call again on the following Monday. That said Catchings also called upon deponent on the 4th day of June, 1907. That between the 23d day of May, 1907, and the 12th day of June, 1907, upon which last date deponent is informed and verily believes, said Catchings served notice of motion to



be made adjudication herein, deponent, with the advice and assistance of his attorneys herein, had deemed it necessary in order to protect and preserve the interest of creditors herein, to determine what action should be made of the contract, then partly completed, of the bankrupt herein, to construct the said tunnel; and immediately following 261
the institution of bankruptcy proceedings a working arrangement was made with the Rapid Transit Subway Construction Company, whereby such Company should advance to the receiver the funds necessary to pay the expenses of completing such contract, including the payment of laborers and bills for supplies, upon the agreement that when the trustee was elected he should enter into a contract with said Company whereby such Company should, among other things, be credited with the funds so advanced, together with interest, as against any

262 liability of it to the bankrupt and its trustee in bankruptcy.

That as appears from "Schedule H" of said receiver's report, said company advanced to the receiver herein during his receivership, more than One hundred and twenty thousand dollars ($120,000.00), of which about Twenty thousand dollars ($20,000.00) was advanced to the receiver on or before the 31st day of May, 1907, and between said date and the 12th day of June, 1907, more than Thirty thousand dollars ($30,000.00) additional; and thereafter deponent, upon his election as trustee, entered into a contract with the said company, contemplated as aforesaid, which contract was
263 thereafter duly approved at a meeting of creditors, and such action was approved by the Referee, as appears more fully from an order duly made by the said Referee on the 12th day of July, 1907.

That a true copy of said contract is hereunto annexed, marked "Exhibit A".

That thereafter, under said contract, said Construction Company from time to time advanced to the Trustee all funds required to pay for coal and other supplies construction material and labor required to complete said tunnel, the amount whereof is shown in the affidavit of Charles A. Gilbert, hereto annexed.

264 That said tunnel has been practically completed and trains are now running therein, and as deponent believes, under the contract for constructing said tunnel all the provisions have now been substantially complied with on the part of the builder, except the restoration of Battery Park and the plantings of trees therein, which is now being carried out.

That the plant of the bankrupt herein, located partly at Battery Park, Borough of Manhattan, and partly at the corner of Furman and Joralemon streets, Borough of Brooklyn, during the construc-

tion of said tunnel, has been practically entirely removed and stored as provided in the contract, a true copy whereof is hereunto annexed, marked "Exhibit B", under which said Construction Company has advanced the funds necessary to remove said plant. That since said 23d day of May, 1907, deponent, as Receiver and Trustee, has performed a large amount of work in completing said tunnel, and a statement of the amount due for such work is now being prepared under the direction of David L. Hough, Esq., consulting engineer to the trustee. 265

T. TILESTON WELLS.

Subscribed and sworn to before me this 9th day of May, 1908. } 266

GEORGE H. FITZGERALD,
(Seal.) Notary Public (No. 164),
Kings Co.

Certificate filed in New York Co.

Exhibit Annexed to Affidavit of T. Tileston Wells.

AGREEMENT made this second day of July, one thousand nine hundred and seven, by and between T. TILESTON WELLS, as Trustee in Bankruptcy of New York Tunnel Company (hereinafter called the Receiver), party of the first part, and RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY (hereinafter called Construction Company), party of the second part: 267

The above named T. Tileston Wells was, by an order of the United States District Court, Southern District of New York, sitting in Bankruptcy, made on the twenty-third day of May, 1907, appointed Receiver of New York Tunnel Company, a bankrupt,

and was also on the same day appointed Ancillary Receiver of said New York Tunnel Company by the United States District Court, Eastern District of New York, sitting in Bankruptcy. At the first meeting of the creditors of said New York Tunnel Company he was duly elected Trustee in Bankruptcy of said New York Tunnel Company.

Construction Company is engaged in the construction of a rapid transit railroad between points in the Borough of Manhattan, City of New York, and points in the County of Kings, City of New York, under contract with the City of New York (acting by the Board of Rapid Transit Railroad Commissioners of the City of New York, dated July 21, 1902).

Tunnel Company at the date of the appointment of the Receiver aforesaid was engaged in the construction of a portion of the above mentioned rapid transit railroad, to wit, the tunnel section under the East River, pursuant to a contract originally made between Construction Company and Andrew Onderdonk, and by said Andrew Onderdonk duly assigned to Tunnel Company, as amended by subsequent agreements between Construction Company and Tunnel Company. Construction Company also holds a chattel mortgage on plant belonging to Tunnel Company. Upon the appointment of the Receiver an arrangement was made to continue the prosecution of the work, without affecting the determination of questions which have arisen between the Construction Company and the Tunnel Company under the above mentioned contracts, it is considered by the parties hereto in the interest of both that the Trustee should carry on to completion the work embraced in said contracts.

In Consideration of the premises and of the stipulation of the parties herein contained, and sub-

ject to the approval of the United States District Court for the Southern District of New York, it is agreed as follows: 271

First. As and from the date of the appointment of the Receiver, the Trustee will continue the prosecution of the work embraced in the said contract. Construction Company will furnish all the material necessary to the performance of the said work from time to time, upon the approval of the Chief Engineer of Construction Company, in like manner as Construction Company has been furnishing such material during the last few weeks prior to the appointment of the Receiver, and the cost of such material, approved by the Trustee, shall be allowed 272 to Construction Company as payment made on account of the contract with Tunnel Company.

The Trustee will furnish the plant of Tunnel Company now subject to the chattel mortgage in favor of Construction Company, and such other plant of Tunnel Company as may be necessary to the prosecution of the work, such labor and superintendence as may be necessary and as shall be approved by the Chief Engineer of Construction Company, and Construction Company will also pay the salary and wages of such employees and laborers, at rates approved by the Trustee and by the Chief Engineer of the Construction Company, when 273 and as the same fall due; and the amount of all such payments shall be allowed to Construction Company as a payment on account of the contract as aforesaid.

Second. The work of sinking iron or steel piles filled with concrete under the tunnel tubes, now in course of performance, shall be regarded as additional work to that embraced in the said contract, and the cost thereof shall be allowed and paid by Construction Company in like manner as is pro-

274 vided in the contract with the Tunnel Company with respect of additional work furnished thereunder.

All amounts expended by the Construction Company as in this article and Article First provided are and shall be disbursed for and on account of the Trustee with like effect in all respects as though said moneys were first physically paid to the Trustee and then by him applied in payment as above specified, as though countersigned by the Referee in Bankruptcy.

THIRD. The Trustee shall not be called upon to perform any work claimed by him to be additional
275 to that embraced in the contract, unless Construction Company shall first agree with the Trustee that the said work shall be treated as additional work, and paid for in accordance with the provisions of the contract with the Tunnel Company respecting additional work.

FOURTH. Upon the completion of the work embraced in said contract, and any work additional thereto which the Trustee shall have been called upon by Construction Company to perform and shall have undertaken to perform, the account shall be made up as between the Trustee and Construction Company as and from the date of the appoint-
276 ment of the Receiver, as follows, viz.: The Construction Company shall be charged with the contract price for work done and materials furnished in carrying out work embraced in the contract from and after the date of the appointment of the Receiver, also for the value of all additional work done and materials furnished in carrying out the work as above provided, ascertained in accordance with the provisions of the contract, or if not provided for therein, then as may be agreed upon between Construction Company and the Trustee. The

Construction Company shall be credited with all payments made from after the date of the appointment of the Receiver; (1) for material furnished in the prosecution of said work as aforesaid; (2) for salaries and wages of employees and laborers in the prosecution of said work; (3) any further amounts which may be paid to the Trustee, or on his order. If the difference between said sums is against Construction Company such difference shall be paid to the Trustee, unless Construction Company shall claim the right to retain or apply the same against amounts due to it by Tunnel Company at the date of the appointment of the Receiver, whether then or thereafter payable, in which case, the matter shall be submitted to the decision of the United States District Court for the Southern District of New York. 277 278

FIFTH. In case the cost to Construction Company of furnishing material, paying labor and otherwise meeting the expense of carrying on the work under this agreement shall exceed the amount payable by Construction Company as above provided, the Trustee will, at the request of Construction Company, apply to the above mentioned Court for leave to issue his certificate of indebtedness for any such excess, in form satisfactory to Construction Company; and in case the Court shall refuse to issue such certificates, then upon ten days' notice from Construction Company to the Trustee this agreement may be terminated; provided, however, that no such application shall be made until the expiration of at least sixty days from the date of this agreement. 279

SIXTH. Nothing in this agreement contained shall be construed to affect the rights or obligations of the Tunnel Company as against Construction Company, or Construction Company as against Tunnel

280 Company, arising on or before the date of the appointment of the Receiver of the Tunnel Company.

Nothing herein contained shall be taken to impose any personal liability upon T. Tileston Wells, Esq., the above-named Trustee, his executors, administrators or assigns.

SEVENTH. This agreement shall not be binding upon either party hereto unless authorized by the above named Court, nor unless consented to in writing by Messrs. Walston H. Brown & Brothers, sureties on the bond given to secure the performance of the contract between Andrew Onderdonk and Construction Company, assigned to Tunnel
281 Company as aforesaid, and who are also parties to certain other agreements with Construction Company in relation to the performance of the said contract.

IN WITNESS WHEREOF the party of the first part has hereunto set his hand and seal, and the party of the second part has caused its corporate seal to be hereunto affixed and these presents to be executed on its behalf the day and year first above written.

T. TILESTON WELLS (SEAL),
Trustee.

In the presence of:
282 JOHN S. HEEP.

RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
By E. P. BRYAN,
(SEAL.) President.
Attest:
H. M. FISHER,
Secretary.

(Acknowledgments and consent of sureties.)

Exhibit Annexed to Affidavit of T. Tileston Wells.

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AGREEMENT made this 30th day of March, 1908, by and between T. TILESTON WELLS, as Trustee in Bankruptcy of New York Tunnel Company, hereinafter called the Trustee, party of the first part, and RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY, hereinafter called Construction Company, party of the second part:

WHEREAS, Construction Company heretofore entered into a contract with The City of New York (acting by the Board of Rapid Transit Railroad Commissioners for the City of New York) bearing 284
date July 21, 1902, for the construction and equipment of a rapid transit railroad in the City of New York, upon routes and plans therein mentioned and described; and

WHEREAS, one Andrew Onderdonk heretofore entered into two certain sub-contracts with Construction Company, dated December 19, 1902, to do certain work and furnish certain materials for use in the construction of the said railroad; and

WHEREAS, the said Andrew Onderdonk duly assigned the said contracts to New York Tunnel Company, a corporation of the State of New York, which 285
covenanted to do and perform all the covenants and agreements contained in the said two sub-contracts of December 19, 1902, and thereby undertaken by the said Andrew Onderdonk, and to secure the performance of said sub-contracts deposited the sum of $250,000.00 with August Belmont & Co., under a certain agreement dated December 19, 1902, it being thereby agreed that a certain part of said sum might be applied in the purchase of machinery and plant for use in the construction of so much of said railroad as was embraced in said two sub-contracts,

286 the said Tunnel Company to execute simultaneously with such purchase a chattel mortgage upon such tools, machinery and plant, to secure the performance of said two sub-contracts; and

WHEREAS, the said New York Tunnel Company, on or about the 15th day of February, 1904, duly executed and delivered to Construction Company a chattel mortgage on all said plant, tools, machinery, buildings, appliances, etc., purchased as aforesaid for use in carrying out said two sub-contracts, which said chattel mortgage bears date the 15th day of February, 1904, and has been duly filed in the Counties of New York and Kings, and is still in full force
287 and effect; and

WHEREAS, the said T. Tileston Wells was by an order of the United States District Court, Southern District of New York, sitting in Bankruptcy, made May 23rd, 1907, appointed Receiver of said New York Tunnel Company, a bankrupt, and was also on the same day appointed Ancillary Receiver of said New York Tunnel Company by the United States District Court, Eastern District of New York, sitting in bankruptcy; and at the first meeting of the creditors of said New York Tunnel Company, he was duly elected Trustee in Bankruptcy; and

288 WHEREAS, by agreement dated July 2nd, 1907, made between the Trustee and Construction Company, the Trustee undertook and agreed to continue the said sub-contracts; and

WHEREAS, the construction work under said sub-contracts has been substantially completed, and there is no further use for the tools, machinery and plant included in said chattel mortgage and used in the prosecution of the work under said sub-contracts as aforesaid; and

WHEREAS, the parties hereto deem it inadvisable to have the said tools, machinery and plant sold at the present time, believing that such sale if made now would realize only a small portion of the actual value of said property; and 289

WHEREAS, it has become necessary to remove the said personal property from its present location on Furman Street in the Borough of Brooklyn, and in Battery Park in the Borough of Manhattan, and the parties hereto have agreed as hereinafter provided:

NOW, THEREFORE, in consideration of the premises and of the covenants and agreements herein contained to be performed by the parties hereto, and subject to the approval of the United States District Court for the Southern District of New York, it is agreed by and between the parties hereto, as follows: 290

FIRST.—The Trustee agrees to do all necessary work to dismantle, transport, and store as hereinafter provided, all the tools, machinery and plant of the New York Tunnel Company, described and referred to in the chattel mortgage, dated February 15th, 1904, made by said Company to Construction Company, and also all the other tools, machinery and plant of said Company used in the prosecution of the work under the contracts hereinbefore referred to. 291

SECOND.—The Trustee further agrees that the work of dismantling and removing said personal property from its present location as aforesaid will be done as soon as possible, and completed prior to the first day of April, 1908, as to the property on Furman Street, and prior to the first day of May, 1908, as to the property in Battery Park.

THIRD.—The Trustee further agrees to have the said personal property moved from its present location as aforesaid and transported to the premises

292 now used and controlled by Construction Company at 221st Street and the Harlem Ship Canal in the Borough of Manhattan, City and County of New York.

FOURTH.—The Trustee further agrees to do all necessary work and furnish all necessary materials for the erection on said premises at 221st Street and the Harlem Ship Canal of such buildings as may be required for the proper storage of said machinery and other personal property.

FIFTH.—The Trustee further agrees to properly store and protect said personal property during the time it shall be in storage as aforesaid.

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SIXTH.—The Trustee further agrees that the personal property described and referred to in said chattel mortgage, dated February 15th, 1904, shall be kept separate and apart from all other property, and that a special inventory thereof shall be made and delivered to Construction Company as soon as possible after the execution of this agreement.

SEVENTH.—The Trustee further agrees that he will not sell, nor attempt to sell the said personal property, described and referred to in said chattel mortgage without giving Construction Company notice in writing of his intention to make said sale
294 at least five days before making the same, unless notice of such sale shall be waived by the President of Construction Company. This agreement is without prejudice to any right the Trustee may have to sell other property used in the performance of said sub-contracts which is not described and referred to in said chattel mortgage made by the New York Tunnel Company.

EIGHTH.—The Trustee further agrees that upon the sale of the personal property described and re-

ferred to in said chattel mortgage dated February 15th, 1904, or of any part thereof, he will forthwith deposit the net proceeds of such sale or sales with one of the institutions designated by the Court as depositories for the money of bankrupt estates, in the Borough of Manhattan, City of New York, in a special trust account, the net proceeds of such property as was purchased partly with said sum of $250,000 deposited with August Belmont & Co. to be divided proportionately, and such proportion thereof as was purchased with part of said fund to be deposited in such special fund. 295

NINTH.—The Trustee further agrees that the rental for the use of the premises at 221st Street and the Harlem Ship Canal, hereinbefore referred to, for the purposes herein provided, shall be Forty Dollars a month, and a proportionate amount for any period less than a month, and that the amount of said rental, together with the other expenses herein provided for, shall be charged against the property to be stored as aforesaid, and that said property shall not be removed from said premises at 221st Street and the Harlem Ship Canal, without the consent in writing of the President of Construction Company, unless said charges shall have been fully paid, at the time of removal; except that the Trustee may remove so much of the said property as is not described or referred to in the said chattel mortgage, dated February 15th, 1904, without such consent, provided that he leaves upon said premises property subject to the lien hereinbefore provided, of the value of at least $5,000, as indicated by the report of the appraisers filed in said bankruptcy proceedings. 296 297

TENTH.—The Trustee further agrees that in case the said premises at 221st Street and the Harlem Ship Canal, shall be required for another use, which the personal property is stored upon it as herein

298 provided, Construction Company may have said property moved to another location, with equal facilities for storage, the expense of such moving and of providing such storage facilities, to be borne by Construction Company. In such case any building or buildings erected by the Trustee on said premises at 221st Street and the Harlem Ship Canal is to become the property of Construction Company; otherwise the building or buildings so erected by the Trustee may and shall be removed by the Trustee, and the land upon which said building or buildings stood restored to its present condition, by the Trustee, and without expense to Construction Company, as soon as possible after storage on said premises as
299 herein provided shall have ceased.

ELEVENTH.—Construction Company agrees, for the rental hereinbefore fixed, to furnish the Trustee with sufficient space on the premises used and controlled by it at 221st Street and the Harlem Ship Canal, or upon other premises with equal facilities, in case said premises shall be required for other uses, for the storage of the personal property hereinbefore referred to, until the same can be sold.

TWELFTH.—Construction Company further agrees that the Trustee may erect on the said premises at 221st Street and the Harlem Ship Canal, such tem-
300 porary building or buildings as may be necessary for the storage of the personal property hereinbefore referred to, provided that the plans for said building or buildings shall have first been submitted to and approved in writing by the Chief Engineer of Construction Company, and shall be placed in such location on said premises as shall be designated by said Chief Engineer. And Construction Company agrees, at the request of the Trustee, to apply for such permits from the municipal authorities as may be necessary to allow of the erection of such building or

buildings, after the plans therefor shall have been approved by the Chief Engineer as aforesaid. 301

THIRTEENTH.—Construction Company further agrees to pay the cost of dismantling, transporting, storing and protecting the personal property hereinbefore referred to, as herein provided, upon the understanding and agreement that the amounts to be paid as aforesaid shall be certified by the Trustee to have been necessarily incurred by him for said purposes, and that said payments shall be a charge against the personal property hereinbefore referred to, and shall be repaid to Construction Company before said property, or any part thereof, shall be removed from its said premises, unless Construction 302
Company shall consent in writing to such removal, except that the Trustee may remove so much of the said property as is allowed by the provisions of the ninth section of this agreement.

FOURTEENTH.—It is agreed that both parties hereto will endeavor to sell the property described and referred to in said chattel mortgage, dated February 15th, 1904, as soon as it can be sold advantageously; and for this purpose the Trustee hereby authorizes and empowers Construction Company, and its officers, to enter into an agreement in writing for the sale of said property, or any part thereof, upon the condition, however, which shall be stated in said 303
agreement, that such sale shall, before the same shall become effectual, be approved and ratified by the Trustee with the authority duly given by the United States District Court for the Southern District of New York, as required by law, and provided that the purchase price to be obtained on such sale shall not be less than the valuation fixed by the appraisers in the bankruptcy proceedings under which the Trustee was appointed.

304 FIFTEENTH.—It is agreed that nothing herein contained shall in any way affect or interfere with the rights of Construction Company under the chattel mortgage hereinbefore referred to, and that whenever and as soon as there shall be any default in the covenants, agreements or conditions contained in or referred to, in said chattel mortgage, Construction Company shall be at liberty to take such action, in regard to the property covered by said mortgage as it may be entitled to take under the provisions of said mortgage, free from any limitation by this agreement.

SIXTEENTH.—It is also agreed that nothing con-
305 tained herein shall be taken to impose any personal liability upon T. Tileston Wells, Esq., the Trustee hereinbefore named, his executors, administrators or assigns; and that this agreement shall not become binding upon either party hereto unless the same shall be approved by the United States District Court for the Southern District of New York, nor unless consented to in writing by Messrs. Walston H. Brown & Brothers, sureties in the bond given to secure the performance of the contract between Andrew Onderdonk and Construction Company, assigned to Tunnel Company as aforesaid; who are also parties to certain other agreements with Construction Company relating to the perform-
306 ance of the said contract.

SEVENTEENTH.—This agreement is made for the purpose of effectuating the removal and sale of the property hereinbefore referred to, without determining the rights of the parties with respect to any of said property, and it is agreed that nothing herein contained shall in any way affect or interfere with the title of the parties hereto as owners or mortgagees, or as Trustee, with respect to said property or the proceeds thereof upon any sale or sales herein provided.

EIGHTEENTH.—This agreement shall apply to the parties hereto, and their successors and assigns. 307

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused its corporate seal to be hereto affixed and attested by its Secretary, and these presents to be signed by its President on the day and year first above written.

In the Presence of:

(Signed) T. TILESTON WELLS [SEAL]
Trustee.

RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY. 308

By E. P. BRYAN,
President.

[SEAL OF R. T. S. C. CO.]

Attest:
H. M. FISHER,
Secretary.

STATE OF NEW YORK, }
County of New York, } ss.:

On this 30th day of March, in the year One thousand nine hundred and eight, before me personally came T. TILESTON WELLS, Trustee in Bankruptcy of New York Tunnel Company, to me known and known to me to be the individual described in and who executed the foregoing instrument, and duly acknowledged to me that the executed the same as such Trustee. 309

ROBERT GERBRACHT, Jr.,
[NOTARIAL SEAL.] Notary Public (No. 105),
Kings County.
Certificate filed in New York County.

310 STATE OF NEW YORK, } ss.:
County of New York, }

On the 3d day of April, in the year One thousand nine hundred and eight, before me personally came E. P. BRYAN, to me known, who being by me duly sworn, did depose and say that he resided in Bound Brook, New Jersey, that he is the President of the RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation,
311 and that he signed his name thereto by like order.

JAMES F. SMITH,
[NOTARIAL SEAL.] Notary Public,
New York Co.

The undersigned, the sureties referred to in the Sixteenth article of the foregoing agreement between T. TILESTON WELLS, as Trustee in Bankruptcy of New York Tunnel Company, and RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY, hereby consent to the execution of said agreement, and agree that such execution shall in no manner affect their liability as sureties on the bond referred to in
312 said agreement, nor any obligations on their behalf under contracts referred to in said agreement.

Dated March 30th 1908.

WALSTON H. BROWN & BROS.
by HERBERT P. BROWN,
by WALSTON H. BROWN,
HERBERT P. BROWN,
Atty.

Answering Affidavit of Richard Steel. 313

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Bankrupt.	In Bankruptcy No. 9835.

314

STATE OF NEW YORK,
Southern District of New York, } ss.:
County of New York,

RICHARD STEEL, being duly sworn, deposes and says, that he is an attorney at law in the office of Philbin, Beekman & Menken, attorneys for the Receiver and for the Trustee herein, and is familiar with the proceedings had herein.

That the petition of Andrew D. Baird, David H. Smith and William H. Clark, that New York Tunnel Company be adjudged a bankrupt, was filed herein on the 23d day of May, 1907, and a subpœna directed to said New York Tunnel Company, returnable on the 29th day of May, 1907, was issued and served upon David L. Hough, President of said New York Tunnel Company, on said 23d day of May, and that thereafter said New York Tunnel Company upon its consent was declared and adjudged bankrupt and the matter referred to Stanley W. Dexter, Esq., Referee. 315

316 That the allegation in said petition concerning the business of the bankrupt is as follows:

> "That the New York Tunnel Company, of the City, County and State of New York, a domestic corporation, has for the greater portion of six months next preceding the date of the filing of this petition had its principal place of business at Battery Park in the Borough of Manhattan, City, County and State of New York, in said District, and is engaged in the business of building and contracting."

That Benjamin S. Catchings, Esq., as attorney for D. Allan's Sons' Rope Company, served notice
317 of motion to have the adjudication herein set aside on the 12th day of June, 1907, fourteen days after the return day of the subpœna. That neither said D. Allan's Sons' Rope Company nor any other creditor or any other person had either appeared herein or answered or demurred to said petition on or before five days after the return day of said subpœna.

That said motion of D. Allan's Sons' Rope Company was adjourned from time to time to on or about March 30, 1908, when it was abandoned.

That on or about the 31st day of May, 1907, two orders to show cause, each returnable on the 3d day of June, 1907, were signed by the Hon. George C.
318 Holt, a judge of this court. These orders required the respective plaintiffs in the actions entitled Mary Hatch Riggs, as administratrix, etc., plaintiff, against New York Tunnel Company, defendant, and Ellen Stack, as administratrix, etc., plaintiff, against New York Tunnel Company, defendant, to show cause why the usual order staying the prosecution of these actions should not be stayed. That the motion in the above named Riggs case was argued on June 10, 1907, before the Hon. George C. Holt, who decided that a stay should be granted

such order to provide for liquidating the cause of action. That the entry of an order pursuant to such decision was made on the 15th day of October, 1907, and on or about the 25th day of October, 1907, Benjamin S. Catchings, Esq., appeared as special counsel and applied for and obtained an extension of twenty days to take proceedings to review said order. That in the other of said cases Thomas C. MacDonald, Esq., who has verified the moving affidavit on this motion, was the attorney of record, and said order to show cause was served upon him on the 31st day of May, 1907. That thereafter, such motion based on said order to show cause was abandoned. 319

That said Benamin S. Catchings, Esq., obtained a review of said order made on the 15th day of October, 1907, by the Circuit Court of Appeals which by a decision handed down by that court on or about the 18th day of February, 1908, was reversed, and an order was subsequently entered, vacating the order granting a stay and permitting suit against the bankrupt. 320

That on the said 23d day of May, 1907, by an order of this Court, made on said day, T. Tileston Wells was appointed Receiver herein, who qualified as such and continued to act as such Receiver until the 25th day of June, 1907, when, having been previously elected Trustee herein, he qualified as Trustee by accepting said trust and filing his bond, which was approved. 321

That over eighty-five creditors have filed proofs of claim with the Referee herein, said claims amounting to over Sixty thousand dollars ($60,000).

That the Borne Scrymser Company mentioned in the notice of motion served on its behalf among others, has filed a proof of claim with Stanley W. Dexter, Esq., the Referee herein to whom under said adjudication of bankrupt this matter has been referred. That a true copy of said proof of debt is

322 hereunto annexed marked "Exhibit C." That as appears from the records of the said Referee said proof of claim was filed with him on the 24th day of June, 1907.

RICHARD STEEL.

Subscribed and sworn to before me this 9th day of May, 1908.

WM. E. CONLEY,
[SEAL.] Notary Public,
N. Y. Co.

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323 **Exhibit Annexed to Foregoing Affidavit of Richard Steel.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER
OF
324 NEW YORK TUNNEL COMPANY,
Bankrupt.

In Bankruptcy No. 9835.

UNITED STATES OF AMERICA,
District of New York,
County of New York, } ss.:

At New York, in said Southern District of New York, on the 11th day of June, A. D., 1907, came O. G. Waring, of New York, in the County of New

York, in said Southern District of New York, and 325
made oath and says that he is treasurer of the Borne Scrymser Company, a corporation incorporated by and under the Laws of the State of New Jersey, and carrying on business at No. 80 South Street, in the County of New York, and State of New York, and that he is duly authorized to make this proof, and says further that the said New York Tunnel Company, the corporation against which a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly and truly indebted to said corporation in the sum of Two thousand and twenty-four and 8/100 Dollars; that the said debt exists upon the books of this company, of which a state- 326
ment is hereto annexed; that the consideration of said debt is as follows: For oils sold and delivered; that the said debt became due on the respective dates set forth in said statement, the average due date being January 14th, 1907; that no note has been received for the said debt nor any judgment rendered thereon except as aforesaid; that no part of the said debt has been paid except as set forth in said statement; that there are no set-offs or counterclaims to the same except , and that said corporation has not nor has any person by its order, or to the knowledge or belief of deponent for its use, had or received any manner of security 327
for said debt whatever, except the following, which are the only securities held for the said debt.

O. G. WARING,
Treasurer of Borne Scrymser Company.

Subscribed and sworn to before me this 11th day of June, A. D. 1907.

LOUIS H. WUSTERMANN,
[NOTARIAL SEAL.] No. 20, Kings County,
Ctf. filed in N. Y. County.

328 **Answering Affidavit of Charles A. Gilbert.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

NEW YORK TUNNEL COMPANY,
Bankrupt.

329

STATE OF NEW YORK,
Southern District of New York, } ss.:
County of New York,

CHARLES A. GILBERT, being duly sworn, deposes and says that since the 23rd day of May, 1907, he has acted as auditor of T. Tileston Wells, Esq., as Receiver, and upon his election and qualification as Trustee in Bankruptcy of the New York Tunnel Company, and has as such had charge of the books of account of said Receiver and said Trustee; that from the said 23rd day of May, 1907, to the 31st day of March, 1908, the Rapid Transit Subway Construction Company has advanced to the said
330 Receiver and the said Trustee the sum of Eight hundred and nineteen thousand nine hundred and eight and eighty-three one-hundredths Dollars ($819,908.83).

CHAS. A. GILBERT.

Subscribed and sworn to before me this 9th day of May, 1908.

E. S. RICE,
[SEAL.] Notary Public (98),
N. Y. County.

(Endorsed)—Affidavit in Opposition to Motion.—Filed May 11, 1908.

Answering Affidavit of Lorenzo D. Armstrong. 331

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

THE NEW YORK TUNNEL COMPANY, 332

Bankrupt.

STATE OF NEW YORK,
County of New York, } ss.:
City of New York,

LORENZO D. ARMSTRONG, being duly sworn, deposes and says that he is the attorney for the New York Tunnel Company, the bankrupt herein; that he has charge of all of the claims against the company founded in tort, and of all litigation instituted thereon. That the statement of the attorney for 333
one James Kelly, an alleged creditor of the said New York Tunnel Company, intervening for the purposes of this motion that there are claims for damages against this company in the neighborhood of Six hundred thousand dollars ($600,000) is misleading and incorrect. These claims originally were in the neighborhod of Six hundred thousand dollars ($600,000), but a large part thereof have no validity and are, in the opinion of deponent, worthless. Of the remaining portion, a large number can be settled for very small sums; that the stock-

334 holders of this company have from time to time advanced sums out of their own personal property for the settlement of these claims, and many of them have been settled; one has been dismissed, and there are now pending actions against the company asking for damages in the total amount of about Four hundred thousand dollars ($400,000). A detailed list of the suits heretofore pending against the company and the manner in which they have been disposed of, is as follows:

That the suit of one James Murphy, brought against this company to recover the sum of $5,000 for personal injuries, has been settled by the pay-
335 ment of $150 in cash.

That the suit of one Owen Flaherty, brought against this company to recover the sum of $5,000, was settled by the payment of $150 in cash.

That the suit of one Gennero Tamburi, brought against this company to recover the sum of $50,000 damages, has been settled by the payment of Seven hundred and fifty dollars ($750) in cash.

That the suit of John Marshall against the bankrupt herein brought to recover the sum of $5,236.25 for personal injuries now in process of settlement and can be settled for $150 in cash.

That the suit of Michael Brennan, brought against the bankrupt to recover the sum of $2,000, was dis-
336 missed by order of the Court on April 22d.

That the suit of one James Colligan, brought against the bankrupt to recover the sum of $5,000, has been settled by a confession of judgment for $1,000.

In the suits of Richard Creeden, John Pridy and John Hughes, brought against the bankrupt herein, each to recover the sum of $10,000, an offer was made to settle said suits by the payment of $175 in cash, but as the attorneys for the bankrupt considered there was no validity in these three re-

spective claims in suit, and no causes of action whatsoever against the bankrupt, this offer of settlement for the sum of $175 was refused. The cases were reached on the call of the calendar last March, but at the request of the attorneys for these claimants the actions were adjourned to the May call of the calendar. 337

In the following cases, brought to recover the amounts set forth hereinafter, the causes have never been placed upon the calendar, nor in the opinion of the attorneys for the bankrupt, is there any validity of the causes of action set forth:

Henry Reiner against New York Tunnel Company, suing to recover the sum of $10,000. 338

Adolph Berliner, suing to recover the sum of $10,000.

Kate Finlay against the New York Tunnel Company, suing to recover the sum of $25,000.

Giovanni Buttacovala against the New York Tunnel Company, suing to recover the sum of $10,000.

Emerich Juhasz against the New York Tunnel Company, suing to recover the sum of $10,000.

The suit of Mary Turbert against the New York Tunnel Company, suing to recover the sum of $30,000, was reached on the calendar on May 4th, 1908, but at the request of the plaintiff was marked off the calendar. 339

The suit of Elizabeth Dougherty, suing to recover the sum of $15,000, was also marked off the ca lar at the request of the plaintiff upon being reached.

The suit of John Keane, suing to recover the sum of $60,000 was also marked off the calendar at the request of the plaintiff's attorney. In this case the plaintiff has left the country and has gone to Ireland.

340 The suit of Eliza Simmons suing to recover the sum of $20,000 was sent down to the foot of the calendar on March 6, 1908, because of the inability of the plaintiff to try the case.

The suit of David Murphy against the New York Tunnel Company suing for $10,000 was settled by a confession of judgment for $400.

The suit of Ellen Stack brought to recover the sum of $30,000 has been marked off the calendar and has never been restored. This suit was brought to recover for the death of one Andrew Callinan who left no relatives surviving him in this country and the only relative who has any claim for damages by reason of this death, is an old mother in
341 Ireland, who has been in correspondence with the attorneys for the company and who has expressed herself as dissatisfied with bringing this suit by the Administratrix appointed.

The case of James Kelly against the New York Tunnel Company being the case of the alleged creditor who is intervening in this motion, was originally brought to recover $60,000 and was settled by a confession of judgment for $9,000.

The case of Mary Riggs against the New York Tunnel Company was brought to recover the sum of $50,000 and was tried on the 13th day of April, 1908, and resulted in a verdict of $35,000 for the
342 plaintiff. The judge reserved, however, his decision upon a motion to set aside the verdict and granted a new trial which said motion is still under consideration and has not yet been decided.

The case of William Fitzgerald was brought to recover the sum of $20,000. The case was reached on the March calendar, and although the defendant refused to settle the case, it was adjourned to the May term on an affidavit that negotiations for settlement were pending.

The case of Joseph Beauregard against the New York Tunnel Company was brought to recover the sum of $50,000. This is one of the few cases which

has probably some validity but the amount of damages, however, can only be determined after a trial. The plaintiff has offered to settle the case for $9,500. 343

In the case of James Forbes suing to recover the sum of $10,000 there has been an offer to settle this case for a confession of judgment of $7,500.

LORENZO D. ARMSTRONG.

Sworn to before me this 11th day of May, A. D., 1908.

JOHN S. KEITH,
Commissioner of Deeds,
City of New York.

(Seal.)

(Endorsed)—Affidavit in opposition to motion.—Filed May 11, 1908. 344

Memorandum of Judge Charles N. Hough on Motion to Set Aside Adjudication.

"The Altenwood Park Co. Case (C. C. A., Mch. 10, '08) apparently leaves such questions as this to depend on the petitioners' laches on the quantum of intervening rights. The tort creditors not having provable claims would under Columbia R. E. Co., 4 A. B. R., 411, have no absolute right to be heard on this motion. The Borne Scrymser Co. is guilty of great laches and the Allen Co. has no claim at all. 345

But, however erroneous this adjudication was, it was a decree or judgment of a court of competent jurisdiction, never appealed from; upon the faith thereof a million dollars have been spent and valuable rights vested and even under the lax practice approved in the Altenwood case this motion should be and is denied.

4, 11, '08.

C. M. H.,
D. J.

346 **Order of District Court Denying Motion to Set Aside Adjudication.**

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms thereof, in the Post Office Building, in the Borough of Manhattan, in said District, on the 15th day of May, 1908.

Present—Hon. CHARLES M. HOUGH, District Judge.

347

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Bankrupt.	In Bankruptcy. No. 9835.

JAMES KELLY, an alleged creditor of the bankrupt herein, having moved this Court for an order vacating, setting aside and annulling all the acts, orders and decisions of this Court herein, including the
348 order of adjudication entered herein on the 29th day of May, 1907, the order appointing a receiver herein entered on the 23d day of May, 1907, and the order of reference entered herein on the 29th day of May, 1907, for an order allowing the said James Kelly or any other party in interest to answer, plead or demur to the petition of creditors to have said New York Tunnel Company adjudged a bankrupt, filed herein on the 23d day of May, 1907, as appears from the notice of motion made in behalf of said James Kelly, and D. Allen's Sons Rope Company,

Borne Scrymser Company, J. A. Beauregard, David Murphy, John Pridy, Richard Creedon, John Hughes, James H. Cooligan, William Fitzgerald, James Forbes, Mary Hatch Riggs, Administratrix, Philip Donovan, Ellen Stack, Administratrix, and James Keane, having joined in said motion as appears from the notice of motion made upon behalf of D. Allen's Sons Rope Company, and others, and said motion coming regularly on to be heard; 349

Now, on reading and filing the said notice of motion made on behalf of said James Kelly, and the affidavit of Thomas C. McDonald verified the 23d day of April, 1908, thereto annexed; the said notice of motion made on behalf of D. Allen's Sons Rope Company and others, and the affidavit of Benjamin S. Catchings verified the 6th day of May, 1908, together with the exhibits referred to in said affidavit and thereto attached, in support of said motion; the affidavit of David L. Hough verified the 8th day of May, 1908, together with a copy of the certificate of incorporation referred to in said affidavit and thereto annexed; the affidavit of T. Tileston Wells verified the 9th day of May, 1908, and exhibits A and B thereto annexed; the affidavit of Richard Steel verified the 9th day of May, 1908, together with exhibit C, thereto annexed; the affidavit of Charles A. Gilbert verified the 9th day of May, 1908, submitted by the trustee in opposition to said motion, and the affidavit of Lorenzo D. Armstrong verified the 11th day of May, 1908, submitted by the bankrupt in opposition to said motion; and after hearing Benjamin S. Catchings, Esq., of counsel for the moving parties herein, in support of said motion, and S. Stanwood Menken, Esq., of counsel for the trustee, and Lorenzo D. Armstrong, Esq., of counsel for the bankrupt herein, in opposition thereto; 350 351

Now, on motion of Philbin, Beckman & Menken, Esqrs., attorneys for the trustees herein, it is

352 Ordered, that said motion be, and the same hereby is in all respects denied.

C. M. HOUGH,
United States District Judge.

(Endorsed)—Order filed May 15, 1908.

Exhibit J—Notice of Appeal.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

353

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Alleged Bankrupt.	Notice of Appeal.

SIRS:

354 Please take notice that in behalf of Mary Hatch Rigg, Administratrix, James Kelly, Borne Scrymser Company, J. A. Beauregard, David Murphy, John Pridy, Richard Creedon, John Hughes, James H. Cooligan, William Fitzgerald, James Forbes, Philip Donovan, Ellen Stack, Administratrix, and James Keane, Tort Creditors and claimants of the New York Tunnel Company, that we have this day appealed from the order of Hon. C. M. Hough filed and entered herein May 15, 1908, in which he refused to vacate and set aside the order of adjudication he herein and refused to permit creditors of the

New York Tunnel Company to answer, plead or demur to the original petition. 355

Dated New York, May 25, 1908.

Yours, etc.,

BENJ. S. CATCHINGS,
Special Counsel for Appellants
and Petitioners.

Exhibit K—Petition for Appeal and Allowances.

356

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Alleged Bankrupt.	Petition for Appeal and Allowances.

357

James Kelly, Mary Hatch Riggs, Admx., Borne Scrymser Company, J. A. Beauregard, David Murphy, John Pridy, Richard Creedon, John Hughes, James Cooligan, William Fitzgerald, James Forbes, Ellen Stack, Admx., and James Keane moving creditors of New York Tunnel Company and parties in interest, feeling themselves aggrieved by the order and judgment entered herein May 15, 1908, denying the motion of and creditors to vacate the adjudication herein and for other

358 relief, do hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this record may be allowed and that a transcript of the record and proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated May 25, 1908.

BENJ. S. CATCHINGS,
Special Counsel for Appellants
359 and Petitioners.

The foregoing petition on appeal is granted and the appeal herein is allowed.

New York, 5/25, 1908.

C. M. HOUGH,
United States District Judge.

360

Exhibit L—Assignment of Errors. 361

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Alleged Bankrupt.	Assignment of Errors.

362

And now on this May 25, 1908, came Mary Hatch Riggs, Admx., James Kelly, Borne Scrymser Company, J. A. Beauregard, David Murphy, John Pridy, Richard Creedon, John Hughes, James H. Cooligan, William Fitzgerald, James Forbes, Philip Donovan, Ellen Stack, Admx., and James Keane, creditor of Alleged Bankrupt and say:

That the order of Hon. C. M. Hough entered in the above entitled proceeding on the 15th day of May, 1908, denying this motion to vacate the adjudication herein and for other relief is erroneous and against the just rights of appellants in the following respects: 363

FIRST. The District Court erred in denying the motion of petitioners to vacate the adjudication herein.

SECOND. That the District Court erred in denying the motion of petitioners for leave to answer plead or demur to the original petition, filed in bankruptcy against the New York Tunnel Company.

364 THIRD. The District Court erred in refusing to grant the motion of appellants.

Wherefore appellants pray that said order and judgment denying their motion to vacate the adjudication herein be reversed and that the District Court be directed to enter an order granting the motion of appellants and for such other relief as may be proper.

BENJ. S. CATCHINGS,
Counsel for Mary Hatch Riggs, Admx., James Kelly, Borne Scrymser Company, J. A. Beauregard, David Murphy, John Pridy,
365 Richard Creedon, John Hughes, James H. Cooligan, William Fitzgerald, James Forbes, Philip Donovan, Ellen Stack, Admx., and James Keane.

(Endorsed)—Notice of Appeal, Petition & Allowance of Appeal & Assignment of Errors.—Filed May 25/08.

366

Exhibit M—Notice of Petition to Review. 367

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

IN THE MATTER

OF

NEW YORK TUNNEL COMPANY, 368
Alleged Bankrupt.

SIR:

Please take notice that I have this day presented to this Court and filed with the Clerk thereof the annexed petition of Mary Hatch Riggs, administratrix; James Kelly, Borne Scrymser Company, J. A. Beauregard, David Murphy, John Pridy, Richard Creedon, John Hughes, James H. Cooligan, William Fitzgerald, James Forbes, Philip Donovan, Ellen Stack, Admx., and James Keane for review by this 369
Court of the decision of the Honorable Charles M. Hough, one of the Judges of the United States District Court for the Southern District of New York, filed and entered with the Clerk of the said District Court the 11th day of May, 1908, denying the motion made in their behalf to vacate the adjudication herein and for leave to plead to the original petition of creditors and that a motion will be made

370 before this Court for a review of the said orders, and for such other and further relief in the premises as may be just.

Dated New York, May 25, 1908.

Yours, etc.,

BENJ. S. CATCHINGS,
Special Counsel.

Copy of written notices of appeal and petition for review and papers thereon received May 25, 1908.

GARVAN, ARMSTRONG & CONGER,
Attorneys for New York Tunnel Co.

371

PHILBIN, BEEKMAN & MENKEN,
Attorneys for T. Tileston Wells,
Trustee and Petitioning Creditors.

372

Exhibit MM—Petition to Review. 373

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

IN THE MATTER

OF

NEW YORK TUNNEL COMPANY,
Alleged Bankrupt. 374

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

The petition of James Kelly, Borne Scrymser Company, Mary Hatch Riggs, Administratrix, J. A. Beauregard, David Murphy, John Pridy, Richard Creedon, John Hughes, James H. Cooligan, William Fitzgerald, James Forbes, Philip Donovan, Ellen Stack, Administratrix, and James Keane respectfully shows to this court:

1.—That heretofore on the 23d day of May, 1907, 375
a petition was filed against the New York Tunnel in bankruptcy and thereafter on May 29, 1907, without taking any proof that the New York Tunnel Company had been principally engaged in manufacturing, printing, publishing, trading, mining or a mercantile pursuit the District Court adjudicated the New York Tunnel Company to be a bankrupt upon the consent of the New York Tunnel Company which adjudication is on file in this cause and is referred to as if fully set forth herein.

376 II.—That, upon information and belief, on the 31st day of May ,1907, the District Court restrained the prosecution of the suit of Mary Hatch Riggs as administratrix against the New York Tunnel Company in the said court, which cause of action was a tort claim and that at that time and thereafter, objection was made to this restraining order on the ground that the court was without jurisdiction in bankruptcy, that the New York Tunnel Company was not such a corporation as could be adjudged bankrupt, and that the claim was a tort claim.

III.—That on November 1, 1907, the District Court restrained the prosecution of the claim of
377 Gennaro Tamburi in the State Court. Prior to this order of the District Court, in answer to the order to show cause why an injunction should not be issued made by Hon. Stanley W. Dexter, Referee, and then upon the hearing before Hon. Geo. C. Holt, the attention of the District Court was called to the condition of the record and that it had never been alleged and proven that the New York Tunnel Company was such a corporation as could be declared bankrupt, and that the District Court both prior to adjudication and subsequent thereto had found and decreed the New York Tunnel Company to have been principally engaged in constructing a
378 sub-aqueous railroad tunnel between the Battery in New York City and Brooklyn.

IV.—That counsel for these petitioners was on May 3, 1907, retained by D. Allen Sons Rope Company and in behalf of the said Rope company and his other clients he noticed a motion, as described in affidavit of Benjamin S. Catchings used upon the motion to vacate the adjudication in the court below. The motion of the D. Allen's Sons Rope Company was adjourned by stipulation with the tunnel company and the trustee in bankruptcy and the

petitioning creditors from time to time up to March 30, 1908, and in the said stipulations it was provided that said adjournments would be without prejudice to such rights as the D. Allen's Sons Rope Company had under this motion. 379

V.—On about Feb. 24, 1908, the United States Circuit Court of Appeals decreed that tort creditors of the New York Tunnel Company had no standing in bankruptcy and were not entitled to participation in the estate of the New York Tunnel Company.

And the Circuit Court of Appeals then refrained from passing upon the jurisdictional question raised. 380

VI.—That petitioners refrained from making a formal motion before the District Court below for the following reasons:

First.—Petitioners relied upon the Allen Sons Rope Company motion which had been made early in June, 1907, and adjourned from time to time up to March 30, 1908, as above described. Second.—Petitioners had no cause for the making of said motion until after the decision of the Circuit Court of Appeals denying them a right to participation in the bankrupt estate and not until after Feb. 24, 1908, did they realize that it was to their interest to set aside the adjudication. Third.—Petitioners 381 relied upon the general power of the District Court and Circuit Court of Appeals to vacate an adjudication and take such steps to prevent injury when its lack of jurisdiction was called to its attention, or was apparent upon the face of the record. Having assigned objections to the jurisdiction of the court in opposing the injunctions issued against them, they postponed making a formal motion, which to them appeared useless until after the question of jurisdiction had been passed upon by the court.

382 VII.—That on April 23, 1908, James Kelly a judgment tort creditor noticed a formal motion, copies of which motion papers are herewith submitted, and upon two occasions this motion was adjourned. Thereafter on May 7, 1908, additional affidavits and motion papers were served and noticed for Monday, May 11, 1908, copies of which motion papers are submitted and referred to. On said day before Hon. Charles M. Hough, United States District Judge, argument was heard upon these motion papers and affidavits. After the argument and without first having obtained permission of the district court, attorneys for New York Tunnel Company and the
383 trustee submitted the affidavits which will be shown in the record and which are referred to. Counsel for petitioners was not advised until late in the afternoon Monday May 11, 1908, that such affidavits had been submitted and he did not receive copies of them until May 12th. Prior to the hearing, counsel for petitioners demanded copies of opposing affidavits from counsel for the trustee but they were refused, and counsel was also refused an opportunity to read these voluminous affidavits; and counsel for petitioners did not know that these affidavits had been submitted until it was too late to reply to them. On Monday, May 11th, Hon. Charles M. Hough denied the motion of petitioners. Counsel
384 for petitioners is informed and believes that Hon. Charles M. Hough was largely influenced in denying the petitioners' motion by reason of the impression made upon him by these affidavits wherein an effort was made to show that over $800,000 had been loaned to the trustee and the Receiver, and that large interests had vested and would be jeopardized by the vacation of the adjudication. Petitioners are informed and believe that the trustee and the Receiver have not incurred any liabilities of importance and that the $800,000 referred to had been paid directly by the Rapid Transit Subway Construction

Company to the employees and material men in connection with the completion of the tunnel between Brooklyn and Manhattan, and it was understood by counsel for the petitioners and creditors and by the Receiver that the payment should be simply considered as an offset against any claim which the New York Tunnel Company or its creditors might have against the Subway Construction Company arising out of the contract between the Tunnel Company and the Subway Construction Company. Claims arising out of the payment of said $800,000 are not recoverable and would not be affected in any way by vacating the adjudication herein. 385

386

IX.—That the District Court erred as a matter of law in denying the motion of petitioners to vacate the adjudication herein and in denying the motion of petitioners for leave to answer, plead or demur to the original petition filed in bankruptcy against the New York Tunnel Company. The order is herewith submitted.

Wherefore petitioners pray that the order of the Hon. Charles M. Hough, Judge of the United States District Court be reviewed by this Court; and the same be reversed and in all respects set aside; and for an order decreeing that the District Court jurisdiction was not conferred upon the District Court by the filing of the original petition herein for an order setting aside the adjudication herein; and directing that petitioners be permitted to answer, plead or demur to the original petition herein, and for such other and further relief as to this Court may seem just and proper. 387

For all of which your petitioners will ever pray.

BENJ. S. CATCHINGS.
Special Counsel.

(Verification March 25, 1908.)

388 **Exhibit N—Stipulation as to Hearing Appeal.**

U. S. CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

IN THE MATTER

OF

NEW YORK TUNNEL COMPANY,
389 Alleged Bankrupt.

MARY HATCH RIGGS, Admx.; JAMES KELLY, BORNE SCRYMSER COMPANY, J. A. BEAUREGARD, DAVID MURPHY, JOHN PRIDY, RICHARD CREEDON, JOHN HUGHES, JAMES H. COOLIGAN, WILLIAM FITZGERALD, JAMES FORBES, PHILIP DONOVAN, ELLEN STACK, Admx., and JAMES KEANE,
390 Appellants and Petitioners.

It is hereby stipulated and agreed that the Clerk of the United States District Court for the Southern District of New York, certify up as the record on the above appeal and the petition to review the following, and no other:

FIRST.—Notice and petition to review order of May 15, 1908.

SECOND.—Order of Hon. C. M. Hough of May 15, 1908. 391

THIRD.—Notice of petition for appeal and allowances.

FOURTH.—Assignment of errors on appeal, stipulation as to record and order of consolidation.

FIFTH.—Decision of Hon. C. M. Hough.

SEVENTH.—Notice of Motion and affidavits of Benjamin S. Catchings and exhibits thereto.

EIGHTH.—Notice of Motion and affidavits of Thomas C. McDonald. 392

NINTH.—Affidavit of David L. Hough, with a copy of the certificate of incorporation of the New York Tunnel Company; affidavit of T. Tileston Wells and Exhibits A and B thereto annexed; affidavit of Charles A. Gilbert and the affidavit of Lorenzo D. Armstrong, and the affidavit of Lorenzo Steel and Exhibit "C" thereto annexed.

TENTH.—Original petition in bankruptcy against New York Tunnel Company of Andrew D. Baird, David H. Smith and William H. Clark. 393

ELEVENTH.—Order of adjudication filed May 29, 1907.

It is further stipulated and agreed that the proceedings presented by the petition to review the order of Hon. C. M. Hough denying notice of petitioners to vacate adjudication herein be consolidated and heard on one record consisting of the abovementioned papers in the United States District

394 Court for the Southern District of New York, and that an order to this effect may be entered without notice.

Dated New York, May 25, 1908.

BENJ. S. CATCHINGS,
Spl. Cnsl. Appellants and Petitioners.

GARVAN, ARMSTRONG & CONGER,
Attorneys for New York Tunnel Co.

PHILBIN, BEEKMAN & MENKEN,
Attorneys for Petitioning Creditors and Trustee.

So ordered.

395 C. M. HOUGH,
D. J.
E. H. L.,
U. S. C. J.

(Endorsed)—U. S. Circuit Court of Appeals, Second Circuit.—In the Matter of New York Tunnel Co., Alleged Bankrupt.—*In re* Riggs *et al.*—Petition to Review and Appeal.—Stipulation and Order of Consolidation and as to Contents of Record.—Benj. S. Catchings, 100 Broadway, N. Y.—United States Circuit Court of Appeals, Second Circuit.—Filed June 10, 1908.—William Parkin, Clerk.

396

Exhibit O—Opinion of United States Circuit Court of Appeals for the Second Circuit. 397

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Before—LACOMBE, COXE & WARD, Circuit Judges.

IN THE MATTER

OF

NEW YORK TUNNEL COMPANY, Bankrupt. 398

BENJ. S. CATCHINGS, for Appellants-Petitioners.

GARVAN, ARMSTRONG & CONGER (LORENZO D. ARMSTRONG), for Bankrupt-Respondent.

PHILBIN, BEEKMAN & MENKEN (CHARLES K. BEEKMAN, S. STANWOOD MENKEN and RICHARD STEEL), for Trustee-Respondent. 399

WARD, Circuit Judge:

This is a petition to review and an appeal from an order of the District Court denying the motion of the Borne-Scrymser Company, a contract creditor of, and of Kelley and others, tort claimants, against the New York Tunnel Company, an adjudicated bankrupt, for an order vacating the adjudica-

400 tion and for leave to plead, answer or demur to the petition for adjudication on the ground that the corporation is not within the Bankrupt Act.

It is objected by the contract creditors and by the trustee, among other things, that the Borne-Scrymser Company has no standing because, having previously filed its claim in bankruptcy, it has acquiesced in the adjudication; *In re Worsham*, 142 F. R., 121, and that the tort claimants have no standing because their claims are not provable in bankruptcy; *In re New York Tunnel Co.*, 159 F. R., 688. Although we think these objections are good, still if the appellants and petitioners have called our attention to a jurisdictional defect which makes
401 the adjudication a nullity, we feel bound to consider it.

If a petition for adjudication were made by only two creditors, the law requiring three, there would be a jurisdictional defect on the face of the record, making any adjudication void. On the other hand, if the aggregate amount of claims were stated to be $500 as required by law, and because of set-offs or other reasons was in point of fact less, an adjudication would be an error to be corrected by appeal. So if the petition were against a railroad company there would be on the face of the record such a jurisdictional defect as would make an adjudication
402 void. Whereas, if the corporation might or might not be considered within the Act an adjudication, even if erroneous, would have to be corrected by appeal.

At the time the adjudication was made in this case building companies had been held in two districts of this Circuit to be within the Act; *In re Niagara Contracting Co.*, 127 F. R., 782, *In re Rutland Realty Co.*, 157 F. R., 296, *In Re Church Construction Co.*, 157 F. R., 298. We have since decided, *In the Matter of the Kingston Realty Co.*, 160 F. R., 447, that they are not subjects of adjudication. It

is, moreover, argued in this case that a tunnel company differs from a building company and is within the Act. Lack of jurisdiction cannot be said to have appeared on the face of the record and therefore the adjudication made by the District Court, even if erroneous, is not a nullity, as we have held in the *Matter of Altonwood Park Co.*, 160 F. R., 448. 403

The petitioners and appellants have proceeded throughout under the Bankruptcy Act. But they are strangers to the bankruptcy proceedings, having no right to prove their claims, to defend or to appeal. The most they can do is to call the attention of the Court as *amici curiae* to a want of jurisdiction of the subject matter appearing on the face of the record, *In re Columbia Real Estate Co.*, 101 F. R., 965. It must be admitted that tort claimants who see the property of a person against whom they make claim seized and administered in bankruptcy to their own exclusion for the benefit of contract creditors have an interest which should be protected and are in bad case if the law afford no remedy. We are, however, clear that they can have no relief in this case in the proceedings they have adopted. If there be no other remedy the Bankruptcy Law should be amended to cover such cases. Both proceedings are dismissed, but, under the circumstances, without costs. 404

405

406 **Exhibit "OO"—Mandate of the United States Circuit Court of Appeals in and for the Second Circuit on Appeal by Riggs et al.**

United States of America, ss.:

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Whereas, lately in the District Court of the United States for the Southern District of New York, before you or some of you in a proceeding en-
407 titled "In the Matter of New York Tunnel Company," an order was entered in the office of the Clerk of said court on the 15th day of May, 1908, in the words and figures following, to wit:

143—48

"James Kelly, an alleged creditor of the bankrupt herein, having moved this Court for an order vacating, setting aside and annulling all the acts, orders and decisions of this Court herein, including the order of adjudication entered herein on the 29th day of May, 1907, the order appointing a receiver herein entered on the 23rd day of May, 1907, and the order of
408 reference entered herein on the 29th day of May, 1907, for an order allowing the said James Kelly or any other party in interest to answer, plead or demur to the petition of creditors to have said New York Tunnel Company adjudged a bankrupt, filed herein on the 23rd day of May, 1907, as appears from the notice of motion made in behalf of said James Kelly, and D. Allan's Sons Rope Company, Borne Scrymser Company, J. A. Beauregard, David Murphy, John Pridy, Richard Creedon, John

Hughes, James H. Cooligan, William Fitzgerald, James Forbes, Mary Hatch Riggs, Administratrix, Philip Donovan, Ellen Stack, Administratrix, and James Keane, having joined in said motion as appears from the notice of motion made upon behalf of D. Allen's Sons Rope Company, and others, and said motion coming regularly on to be heard; 409

Now, on reading and filing the said notice of motion made on behalf of said James Kelly, and the affidavit of Thomas C. McDonald, verified the 23rd day of April, 1908, thereto annexed; the said notice of motion made on behalf of D. Allen's Sons Rope Company and others, and the affidavit of Benjamin S. Catchings verified the 6th day of May, 1908, together with the exhibits referred to in said affidavit and thereto attached, in support of said action; the affidavit of David L. Hough verified the 8th day of May, 1908, together with a copy of the certificate of incorporation referred to in said affidavit and thereto annexed; the affidavit of T. Tileston Wells verified the 9th day of May, 1908, and exhibits A and B thereto annexed; the affidavit of Richard Steel verified the 9th day of May, 1908, together with exhibit C, thereto annexed; the affidavit of Charles A. Gilbert verified the 9th day of May, 1908, submitted by the trustee in opposition to said motion, and the affidavit of Lorenzo D. Armstrong verified the 11th day of May, 1908, submitted by the bankrupt in opposition to said motion; and after hearing Benjamin S. Catchings, Esq., of counsel for the moving parties herein, in support of said motion, and S. Stanwood Menken, Esq., of counsel for the trustee, and Lorenzo D. Armstrong, Esq., of counsel for the bankrupt herein, in opposition thereto; 410 411

412 Now, on motion of Philbin, Beekman & Menken, Esqrs., attorneys for the trustees herein, it is

Ordered, that said motion be, and the same hereby is in all respects denied.

C. W. Hough,
United States District Judge."

As by the inspection of a transcript of the record of the said Court which was brought into the United States Circuit Court of Appeals for the Second Circuit by virtue of the appeal and petition for review agreeably to the Act of Congress in such case made and provided fully and at large appears;

413 And whereas, in the present term of October in the year of our Lord One thousand nine hundred and eight, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit on the said transcript of record and was argued by counsel on consideration whereof, it is hereby

Ordered, adjudged and decreed that the petition to review and appeal be and hereby are dismissed without costs.

You, therefore, are hereby commanded that such further proceeding be had in said cause in accordance with the decision of this Court as according to right and justice and the laws of the United States

414 ought to be had, the said petition and appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States the Twenty-eight day of December in the year of our Lord One thousand nine hundred and eight.

(Signed) William Parkin,
(Seal) Clerk of the United States Circuit Court of Appeals for the Second Circuit.

Exhibit P—Notice of Motion to Renew. 415

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, a bankrupt.	In bankruptcy.

416

To Messrs. PHILBIN, BEEKMAN & MENKEN, Attorneys for T. Tileston Wells, Trustee for New York Tunnel Co., and the petitioning creditors, and GARVAN, ARMSTRONG & CONGER, Attorneys for New York Tunnel Co.

Gentlemen:

Please take notice that on Monday, December 21st, 1908, at 10.30 a. m., or as soon thereafter as counsel can be heard before the District Court of 417
the Southern District of New York, in the Court Rooms thereof, in the Post Office Building, New York City, I will renew motions of James Kelly, Mary Hatch Riggs, Borne Scrymser Co., and others, heretofore argued before Judge Hough, and will move a re-hearing of the motion to vacate and set aside and annul all actions of the District Court in connection with the New York Tunnel Company, and to set aside the adjudication, dismiss the original petition in bankruptcy, and to turn over all of the assets and property of New York Tunnel Com-

418 pany to the corporation, or to whomsoever may be entitled thereto; and this motion will be made upon all the papers on file in this cause, the affidavits heretofore served upon you herein and the record on appeal.

Respectfully yours,

BENJ. S. CATCHINGS,
Of Counsel for the Motion.

Exhibit Q—Order Referring Motion to Renew to Charles M. Hough, District Judge.

419

At a Stated Term of the District Court of the United States, for the Southern District of New York, held at the Court Rooms thereof in the Post Office Building, in the Borough of Manhattan, in said District, on the 24th day of December, 1908.

Present—Hon. GEORGE C. HOLT, District Judge.

420

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Bankrupt.	In Bankruptcy. No. 9835.

Mary Hatch Riggs, Admx.; James Kelly, Borne Scrymser Company, J. A. Beauregard, David Mur-

phy, John Pridy, Richard Creedon, John Hughes, James H. Cooligan, William Fitzgerald, James Forbes, Philip Donovan, Ellen Stack, Admx., and James Keane, by their counsel, Benjamin S. Catchings, having served notice of motion, which provides as follows: 421

> "Please take notice that on Monday, December 21st, 1908, at 10:30 A. M., or as soon thereafter as counsel can be heard before the District Court of the Southern District of New York, in the court rooms thereof in the Post Office Building, New York City, I will renew motions of James Kelly, Mary Hatch Riggs, Borne Scrymser Co., and others, heretofore argued 422
> before Judge Hough and will move a re-hearing of the motion to vacate and set aside and annul all actions of the District Court in connection with the New York Tunnel Company, and to set aside the adjudication, dismiss the original petition in bankruptcy, and to turn over all of the assets and property of New York Tunnel Company to the corporation, or to whomsoever may be entitled thereto; and this motion will be made upon all the papers on file in this cause, the affidavits heretofore served upon you herein and the record on appeal."

and said motion coming on to be heard at said time 423
and place,

Now, on reading and filing the said notice of motion, together with the affidavits, orders and papers therein referred to, including the Decree of Judgment of Adjudication herein, dated the 29th day of May, 1907, in support of said motion, and the affidavit of Richard Steel, verified the 19th day of December, 1908, together with the Exhibits thereto annexed, submitted by the Trustee in opposition

424 thereto, and after hearing Benjamin S. Catchings, Esq., of Counsel in support of said motion, and Charles K. Beekman, Esq., of Counsel for the Trustee in opposition thereto; and it appearing that a motion was made in behalf of the same parties before Hon. C. M. Hough, one of the Judges of this Court, for the same purposes on May 15th, 1908, and that on said date a decision was rendered thereon denying the said motion, and it appearing that in orderly procedure a motion for the re-hearing of the motion and decision of Hon. C. M. Hough should be first made before him and should not be re-heard by another Judge of the same Court unless such re-

425 hearing shall have first been referred by him;

NOW, on motion of PHILBIN, BEEKMAN & MENKEN, Esqs., Attorneys for the Trustee herein, it is

ORDERED, that the said motion for re-hearing be and the same hereby is referred to Hon. C. M. Hough, one of the Judges of the District Court for the Southern District of New York.

GEO. C. HOLT,
United States District Judge.

426

Exhibit R—Affidavit of Richard Steel on Motion for Rehearing. 427

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Bankrupt.	In Bankruptcy. No. 9835.

428

State of New York,
Southern District of New York, } ss.:
County of New York.

RICHARD STEEL, being duly sworn, deposes and says, that he is an attorney-at-law in the office of Philbin, Beekman & Menken, attorneys for the Trustee herein, and is familiar with the proceedings had herein.

That on the 23d day of April, 1908, Benjamin S. Catchings served notice of motion upon the attorneys for the Trustee herein in the above entitled proceeding, returnable the 27th day of April, 1908, to be heard before this Court in the Court Rooms thereof, for an order vacating and setting aside the adjudication herein and for certain other relief, and said motion was adjourned until the eleventh day of May, 1908; and thereafter the said Benjamin S. Catchings, Esq., served an additional affidavit and a notice that Borne Scrymser Company and J. A.

429

430 Beauregard and others would join in said motion, and at said time said motion was argued before the Hon. Charles M. Hough, District Judge, and thereafter said motion was denied, as appears more fully from an order of this Court dated the fifteenth day of May, 1908, duly made and entered herein.

That hereto annexed, marked Exhibit "A," is a copy of the decision handed down by the Hon. Charles M. Hough, District Judge, upon said motion.

That thereafter certain of said moving parties, including James Kelly, Mary Hatch Riggs and Borne Scrymser Company appealed from said order to the United States Circuit Court of Appeals
431 for the Second Circuit, and also filed their petition for a review of said order by said Court. That subsequently said appeal and said petition for a review were argued before the said United States Circuit Court of Appeals, which, on Tuesday last, the fifteenth day of December, 1908, handed down a decision, a true copy of which is hereto annexed, marked Exhibit "B."

That deponent on the seventeenth day of December, 1908, called at the office of the Clerk of said United States Circuit Court of Appeals and was informed that the mandate of such Court, in accordance with such decision, would issue thereafter and
432 that the attorneys for the Trustee herein would receive notice when such mandate would issue.

That the attorneys for the Trustee have not received notice of the issuance of any such mandate herein, and according to deponent's understanding of the practice prevailing in said Circuit Court of Appeals the mandate of said Court is not issued until ten days after the rendering of the decision by such Court, as provided by Rule 36, Subd. 2, of such Court, so that a mandate will not be issued by

said Court to this District Court for the Southern District of New York in the above entitled proceeding until the twenty-sixth day of December, 1908. 433

RICHARD STEEL.

Subscribed and sworn to before me this 19th day of December, 1908.

WM. E. CONLEY,
Notary Public,
(Seal.) N. Y. Co.

Exhibit S.—Order Making Decision of United States Circuit Court of Appeals for the Second Circuit, the Order of the United States District Court for the Southern District of New York. 434

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms thereof, in the Post Office Building, in the Borough of Manhattan, in said District, on the 5th day of January, 1909.

Present—Hon. GEORGE C. HOLT, District Judge.

435

IN THE MATTER OF NEW YORK TUNNEL COMPANY, Bankrupt.	In Bankruptcy No. 9835.

This matter coming on to be heard and it appearing that Mary Hatch Riggs, Administratrix,

436 James Kelly, Borne Scrymser Company, J. A. Beauregard, David Murphy, John Pridy, Richard Creedon, John Hughes, James H. Cooligan, William Fitzgerald, James Forbes, Philip Donovan, Ellen Stack, Administratrix, and James Keane appealed to the United States Circuit Court of Appeals for the Second Circuit from, and also sought by their petition a review of, a certain order entered in the office of the Clerk of this Court on the 15th day of May, 1908 with the words and figures following:

"James Kelly an alleged creditor of the bankrupt herein having moved this Court for an order vacating setting aside and annulling
437 all the acts orders and decisions of this Court herein including the order of adjudication entered herein on the 29th day of May, 1907 the order appointing a receiver herein entered on the 23rd day of May 1907 and the order of reference entered herein on the 29th day of May 1907 for an order allowing the said James Kelly or any other party in interest to answer plead or demur to the petition of creditors to have said New York Tunnel Company adjudged a bankrupt filed herein on the 23rd day of May 1907 as appears from the notice of motion made in behalf of said James Kelly
438 and D. Allen's Sons Rope Company, Borne Scrymser Company, J. A. Beauregard, David Murphy, John Pridy, Richard Creedon, John Hughes, James H. Cooligan, William Fitzgerald, James Forbes, Mary Hatch Riggs, administratrix, Philip Donovan, Ellen Stack, administratrix and James Keane having joined in said motion as appears from the notice of motion made upon behalf of D. Allen's Sons Rope Company and others, and said motion coming regularly on to be heard.

Now on reading and filing the said notice 439
of motion made on behalf of said James Kelly and the affidavit of Thomas C. McDonald verified the 23rd day of April 1908 thereto annexed, the said notice of motion made on behalf of D. Allen's Sons Rope Company and others and the affidavit of Benjamin F. Catchings, verified the 6th day of May 1908 together with the exhibits referred to in said affidavit and thereto attached in support of said motion; the affidavit of David L. Hough, verified the 8th day of May, 1908 together with a copy of the certificate of incorporation referred to in said affidavit and thereto annexed; the affidavit of T. Tileson 440
Wells, verified the 9th day of May 1908 and exhibits A. and B. thereto annexed; the affidavit of Richard Steel, verified the 9th day of May 1908 together with exhibit C. thereto annexed; the affidavit of Charles A. Gilbert verified the 9th day of May 1908 submitted by the trustee in opposition to said motion and the affidavit of Lorenzo D. Armstrong verified the 11th day of May 1908 submitted by the bankrupt in opposition to said motion; and after hearing Benjamin F. Catchings, Esq., of counsel for the moving parties herein in support of said motion and S. Stanwood Menken, Esq., of 441
counsel for the trustee and Lorenzo D. Armstrong, Esq., of counsel for the bankrupt herein in opposition thereto;

Now on motion of Philbin, Beckman & Menken, Esqs., attorneys for the trustees herein it is

Ordered that said motion be and the same hereby is in all respects denied.

C. M. Hough.
United States District Judge."

442 and the United States Circuit Court of Appeals for the Second Circuit at its October Term, 1908, having duly heard said appeal and petition for review upon the transcript of the record of this Court, and having thereupon ordered, adjudged and decreed that the said petition to review and appeal be dismissed without costs, and that said matter be remanded to this Court for further proceedings in accordance with the decision of said United States Circuit Court of Appeals in this case as according to right, justice and the laws of the United States ought to be had, the said petition to review and appeal notwithstanding, which said order, decree and instructions appear to this Court by the mandate of the
443 said United States Circuit Court of Appeals for the Second Circuit dated the 28th day of December, 1908;

NOW, THEREFORE, on reading and filing the said mandate; it is

ORDERED that the said decision, order and decree of the said United States Circuit Court of Appeals for the Second Circuit be and the same hereby are made the order, decree and decision of this Court.

GEO. C. HOLT,
United States District Judge.

444

Exhibit T—Letter Addressed to Respondent Charles M. Hough.

445

January 15, 1909.

Hon. C. M. Hough,
Addressed.

Dear Sir:—

In the matter of New York Tunnel Company—an appeal was taken from your order denying the motion of tort creditors to set aside the adjudication. The Appellate Court upheld your views that the tort creditors had no standing in court. They practically held that when property of a corporation is taken in bankruptcy, that the tort creditors 446
should be entitled to a hearing, but that unless the action of the lower court was absolutely void, they could not interfere, and therefore dismissed the proceedings.

The laws seems to make it discretionary entirely with the District Court as to what relief can be given to these creditors. We have made a motion for re-hearing, which in ordinary course of practice came on before Judge Holt. He entered an order in which he stated that until you had first referred the motion to him he could not re-hear a motion which has once been decided by you. In view of the fact that the motion which you decided was 447
practically an application for re-hearing of a decision made by Judge Holt, it would seem that the proper practice at that time would have been to have allowed the matter to go before Judge Holt. At any rate, there seems to be no other course open to us than a full presentation of the matter before Judge Holt, who made the adjudication originally, and whose opinion we should be entitled to have

448 upon our motion for re-hearing. In view of the indefiniteness as to when you will be sitting and in view of the peculiar exigencies of this case, I would ask that you permit this motion for re-hearing to be heard by Judge Holt; and I believe that a letter will be sufficient for this purpose.

I am sending a copy of this communication to Philbin, Beekman & Menken, attorneys for the trustee, and to Garvin, Armstrong & Conger, attorneys for the New York Tunnel Co., and am using this method of communicating with you at the suggestion of the Clerk's Office.

Yours very truly,

449 BENJAMIN S. CATCHINGS,
Counsel for Mary Hatch Riggs and others.

450

Exhibit U—Letter in Reply to Letter (Exhibit T) Addressed to Respondent, Charles M. Hough, by Counsel to Petitioner. 451

New York City, January 19th, 1909.

Benjamin S. Catchings, Esq.,
Holland House, N. Y.

Dear Sir:—

Judge Holt requests me to say: that Judge Hough has referred to him your letter of January 15th, asking that Judge Hough permit the motion for rehearing, in the matter of the New York Tunnel Company, to be heard before Judge Holt, and Judge Holt understands that Judge Hough has no objection to Judge Holt taking any action in the case that he think fit. Judge Holt considers, however, that there is no propriety in his rehearing a motion decided by Judge Hought; it is, in substance, nothing but an appeal from one judge to another. A rehearing is not a matter of right. Judge Hough's health is such that he undoubtedly is not able to give you a rehearing and Judge Holt declines to give a rehearing on a matter decided by Judge Hough. 452

Yours very truly, 453

G. E. McILWAINE.

454 **Exhibit V—Order Approving Contract Between Trustee in Bankruptcy and Rapid Transit Subway Construction Company.**

At a Court of Bankruptcy of the District Court of the United States held in and for the Southern District of New York, at No. 71 Broadway, in the Borough of Manhattan, City of New York, on the 12th day of July, 1907.

455 Present—STANLEY W. DEXTER, Esq., Referee.

In the Matter of NEW YORK TUNNEL COMPANY, Bankrupt.	In Bankruptcy No. 9835.

Whereas, at an adjourned first meeting of credi-
456 tors of the bankrupt above named, duly called and held on the 2nd day of July, 1907, the following resolution was adopted:

Resolved: That the contract bearing date the 2nd day of July, 1907, made between Rapid Transit Subway Construction Company and T. Tileston Wells as Trustee of New York Tunnel Company, the bankrupt herein, be, and the same hereby is ratified, adopted, approved and confirmed by us the creditors of said bankrupt, and the Trustee herein be and he hereby

is authorized and directed to carry out the terms and conditions thereof, and be it further 457

Resolved, that a copy of said contract be spread at length upon the minutes of this meeting.

And the following resolution was also adopted:

Resolved: That for the purpose of calculating the compensation of the Trustee herein, all moneys paid out by the Rapid Transit Subway Construction Company under and pursuant to the said contract bearing date the 2nd day of July, 1907, entered into between the Rapid Transit Subway Construction Company and said Trustee, for labor employed or materials used by the said Trustee in conducting the business of the bankrupt, be deemed and taken to be moneys disbursed by the said Trustee, and he shall be entitled to commissions upon all moneys paid out as aforesaid, at the rate provided by the National Bankruptcy Act for the commissions of Trustees, as if the same had been directly paid out by the said Trustee. 458

And

Whereas, it appears that it will be for the best interests of the estate of said bankrupt for the Trustee to carry out the provisions of the contract referred to in said resolutions, 459

Now, on motion of Philbin, Beekman & Menken, attorneys for the Trustee, it is,

Ordered, that said resolutions and each of them be and the same are hereby approved and confirmed, and it is further

Ordered, that the action of the Trustee in entering into the contract referred to in said resolutions, a copy of which contract is hereto annexed,

460 be and the same hereby is ratified, adopted, approved and confirmed as and for the act of the Trustee duly authorized by the creditors of the bankrupt herein, and it is further.

Ordered, that the Trustee be and he hereby is authorized and directed to carry out the terms and conditions of the said contract; and it is further

Ordered, that for the purpose of calculating the compensation of the Trustee herein, all moneys paid out by the Rapid Transit Subway Construction Company under and pursuant to the terms of said contract for labor employed or materials used by the said Trustee in conducting the business of the bankrupt, be deemed and taken to be moneys dis-
461 bursed by the said trustee, and he shall be entitled to commissions upon all moneys paid out as aforesaid at the rate provided by the National Bankruptcy Act for the commissions of Trustees as if the same had been paid out directly by said Trustee.

STANLEY W. DEXTER,
Referee in Bankruptcy.

462

Office Supreme Court, U. S.
FILED.
APR 10 1909
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 11.

(ORIGINAL.)

IN THE MATTER

OF

THE APPLICATION OF MARY HATCH RIGGS, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF CLARENCE B. RIGGS, DECEASED, IN BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE GEORGE C. HOLT AND CHARLES M. HOUGH, JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND AGAINST THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PETITIONER.

BENJAMIN S. CATCHINGS,

Of Counsel for Petitioner.

Holland House,

New York.

(Consultation Office.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 11.

(ORIGINAL.)

IN THE MATTER

OF

THE APPLICATION OF MARY HATCH RIGGS, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF CLARENCE B. RIGGS, DECEASED, IN BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE GEORGE C. HOLT AND CHARLES M. HOUGH, JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND AGAINST THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PETITIONER.

STATEMENT OF CASE.

This cause comes on upon original petition for writ of prohibition by reason of the exercise of jurisdiction of the District Court of the Southern District of New York over New York Tunnel Company, a corporation principally engaged in the business of constructing a tunnel under East River between Brooklyn and New York in bankruptcy, thereby depriving complainant, Mary Hatch Riggs, Admx., a Tort creditor, of her share in the estate of the insolvent corporation.

The bill sets forth at length the equities surrounding the efforts of petitioner in lower Courts and sufficiently shows her

freedom from Laches and her equitable standing before this Court.

In considering the defence which will probably be made on the question of intervening rights, a close reading of the contract between T. T. Wells and the Rapid Transit Subway Construction Company will disclose that Judge C. M. Hough was wholly in error in stating that the Trustee had borrowed one million dollars. (Return folio 344, 345.) It will be noted that the trustee is not bound to repay any money paid by the Rapid Transit Company in completing the construction work. (Return folio 271-273, 274.)

The case presents the following points:

1st. The District Court is without jurisdiction over the Tunnel Company. 2d. If the District Court has jurisdiction, the act is unconstitutional in that it deprives the unliquidated Tort creditor of property without due process of law. 3d. Complainant is without relief other than by this equitable petition and the Supreme Court has jurisdiction thereof. 4th. The equities demand the relief prayed for. 5th. The prayer should be granted.

I.

The District Court is Without Jurisdiction Over the New York Tunnel Company.

New York Tunnel Company is a corporation (Folio 6 of the petition).

It was not a corporation principally engaged in trading, printing, publishing, mining, manufacturing or a mercantile pursuit (petition folio 7), and this was apparent upon the face of the petition in bankruptcy (petition folio 6, Return folio 26, 38).

The statute is strictly construed and jurisdiction thereunder is derived from the statute only.

New York vs. New Jersey Ice Lines, C. C. A., 2d Circuit, from Sou. Dist., N. Y., 147 Fed., 214, Wallace, Lacombe & Coxe, C. J. S.

Section 4b, enumerating classes of corporations subject to the act, is to be strictly construed and includes only such corporations as are clearly within the enumeration.

Mr. Justice Lacombe says:

"The Bankruptcy Act of 1867 covered all moneyed business or commercial corporations and joint stock companies. This was a very comprehensive clause, and when Congress in a later act undertakes, in place of it, to give a specific enumeration of the particular kinds of business in which corporations must be 'principally engaged' in order to bring them within the terms of the act, it is to be assumed that the words of such enumeration were used ex industria to restrict the provisions of the statute to such corporations only as are clearly within the enumeration."

104 F., 67, Chicago Joplin Lead & Zinc Co. (By Phillips D. J. W. D. Missouri, October 10, 1900.)

"The Bankrupt Act (Sec. 43) limits the corporations which may be put into bankruptcy to such as are 'engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits.' . . . The burden of proof rests upon the petitioners," etc.

140 Fed., 840 Butt, et al. vs. C. F. McNichol Const. C. (Circuit Court of Appeals, Fourth Circuit, Nov. 9, 1905).

Before Pritchard, Circuit Judge, and Morris and Purnell, District Judges.

"Hughes on Federal Procedure, a work which has recently been published, in discussing this question, on page 86, says:

"As to the corporations against whom involuntary proceedings may be taken, the policy of the present law is very different from that of the Act of March 2, 1867. That act allowed

the proceeding against all moneyed, business and commercial corporations and joint stock companies. The language of the present act, as seen above, is entirely different, and therefore the decisions construing the old act must be cautiously used in construing the present one. The intent of Congress was evidently to limit very largely the corporations against whom such proceedings can be taken, probably for the reason that other remedies for the liquidation of insolvent corporations are abundant, and the further reason that a bankrupt law is not as necessary to a corporation as to an individual. In view of this patent intent of Congress to limit the range of the Bankrupt Act as to corporations, it would seem the duty of the courts to construe the language of the act strictly in this respect, though this has not always been done. In re New York Water Company (D. C.), 98 Fed., 711. The appellee had no principal place of business, nor was it engaged in manufacturing bridges to be placed upon the market, as such, but was simply engaged in constructing bridges, wharves and bulkheads on the premises of those who employed it and driving piles for foundations for building under contract.

. . . "This class of work is easily distinguished from that of large establishments and shops which are maintained by and operated principally for the purpose of manufacturing the different structural parts of bridges, etc. The parts thus completed are the finished product, and it is only necessary to transport the same to the place where the bridge is to be erected and place them together in order to complete the structure. In such instances the raw material is by hand or machinery transformed into the finished product, and persons thus engaged are as essentially manufacturers as are those who manufacture saw mills, steam engines, mowers, reapers, and other useful implements, which are usually constructed so as to enable the manufacturers to ship the different parts to the point of delivery, where they are placed together, thus completing the machines, the manufacture of which is the principal business of the parties thus engaged in placing such articles on the market. The finished product is the result of the process of manufacture, and the courts have universally held that persons thus engaged are manufacturers.

"It is contended by the petition that there is no reason why a construction company should not be subject to the provisions of the bankrupt law; that, if the law is not so construed as to include this class of corporations, great injustice may be

done by permitting such companies to prefer certain of their creditors to the exclusion of others. While such may be true, the court is not in a position to remedy the evil of which the petitions complain, inasmuch as it has no power to alter, amend or change the existing law. We can only apply the law to such cases as are contemplated by that statute. Congress is the only body that has the power to enact laws for the purpose of adjusting any inequalities that may exist, and until such action by that body can be secured the courts are powerless to interfere. In re New York & W. Water Company, 98 Fed., 711, District Court S. D., New York, January 8, 1900. The Act of 1898 is much more limited in its application to corporations than the Act of 1867. By the latter act it was declared (Section 5122, Rev. St.) to apply all moneyed, business or commercial corporations and joint stock companies'. The present act is restricted to corporations 'engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits'.

"The intention of Congress greatly to restrict the application of the present act appears manifest, not only from the report of the Congressional Conference Committee upon this point."

Murphy vs. Utter, 186 U. S., 111.

"Every word or clause used in a statute is presumed to have a meaning of its own independent of other clauses."

"Remington on Bankruptcy," p. 80. "Jurisdiction of the District Court over corporations is more limited by the act of 1898 than the act of 1867."

The petition in bankruptcy (petition folio 6. Return page 9) alleged the corporation to be "Engaged in the business of building and contracting." Building companies and contracting companies are not within Section 4 B of the Statute, and the filing of such a petition did not bring the Tunnel Company within the limited jurisdiction of the District Court, and all action thereon was void.

Kingston Realty Co., 160 Fed., 445 C. C. A., 2nd Circuit, page 446, Judge Noyes says:

"Is the building of houses manufacturing? It strains the term to so use it—goods, wares and merchandise are manu-

factured; houses are constructed. Houses are real estate. They are not articles of commerce, and 'manufacturing' does not apply to their construction. The distinction would seem to run along the line of those articles which are more or less fixed in place and not ordinarily the subjects of bargain and sale as articles of commerce as distinguished from those that are movable and ordinarily regarded as subjects of sale and manual transfer—articles of trade in the common course of mercantile business," 127 Fed., 99; 158 Fed., 593.

New York Tunnel Co., 165 F. 284.

"At the time the adjudication was made in this case, building companies had been held in two districts of this circuit to be within the Act; In re Niagara Contracting Co., 127 F. R. 782; In re Rutland Realty Co., 157 F. R. 296; In re Church Construction Co., 157 F. R. 298. We have since decided in the Matter of the Kingston Realty Co., 160 F. R. 447, that they are not subjects of adjudication."

Haul & Kaul Co. vs. Friday, et al. (3rd Circuit Court of Appeals, December 27, 1907).

(Judge Gray—headnote) a corporation, the principal business of which is the building and construction of concrete arches, bridges, buildings, walls and other structures in situ, is not one engaged principally in manufacturing, and is not subject to adjudication as a bankrupt.

"Remington on Bankruptcy," p. 81. "The common and popular meaning given to classes of corporations must be followed."

"Remington on Bankruptcy," p. 84. "Corporations must be principally engaged in the class of business pleaded."

"Remington on Bankruptcy," p. 90. "Building and construction companies are not subject to bankruptcy. They are not traders because they do not buy and sell, nor are they manufacturers because they do not make a commodity. They simply construct."

In re Mannering vs. Evans, 156 Fed., 109.

"In the present case the petition in bankruptcy was defective on its face . . . the filing of a petition in bankruptcy is

notice to all the world . . . if on its face it appears to be in proper form, creditors who do not join in it are entitled to rely upon it as a good petition . . . but to extend that rule to a case in which the petition shows on its face that the requisite number of creditors have not joined in it—a defect every creditor is bound to observe—is equivalent to adjudging a petition valid in which the acts of bankruptcy charged were committed more than four months before the filing of the petition."

In re Elmira Steel Co., 109 Fed., 456.

Headnote. "A petition in involuntary bankruptcy against a corporation must allege that such corporation is one of the class which may be adjudged bankrupt under Section 4 b. A petition which contains no allegation as to the business in which the corporation is engaged confers no jurisdiction upon the Court, and all proceedings thereon, including an adjudication made without proof, except the admissions made by the corporation, are void."

Page 479. "But the Bankruptcy Act does not except certain corporations from its involuntary bankruptcy, but from among all corporations selects a few which may be so subjected . . . jurisdictional facts must be alleged . . . so that it has been held that to sustain proceedings in involuntary bankruptcy the petition must allege and the proof show that the corporation is authorized by its charter and is, or was, in fact, principally engaged in the business named in the act in declaring what corporations may be adjudged involuntary bankrupts. (Cites 104 F., 67, 101 Fed., 42.) The petition contained no allegation as to the character of the corporation against which it was directed . . . the conclusion is irresistible that this petition conferred no jurisdiction whatever upon the . . . district court, and that all proceedings therein, including the adjudication made upon that petition and all subsequent proceedings which had been or may be had thereunder, including the appointment of receivers, the appointment of a Trustee, if any, and his title are absolutely void as against any person, who, anywhere and at any time may raise the objection." Vide quoque, 130 Fed., 981; 129 Fed., 201; 130 Fed., 957; 128 F., 631.

In re Stein, 130 Fed., 377.

"A petition in involuntary bankruptcy which does not show upon its face that the claims of petitioners amount to more than $500 does not give the Court jurisdiction, and it has no power to allow an amendment joining other creditors having claims sufficient to make up the requisite amount."

In re Rosenberg, 116 Fed., 402.

"Where a proceeding before a referee . . . was dismissed for want of jurisdiction, the entire proceedings necessarily become null."

Simultaneously with the filing of the petition in bankruptcy, a petition for the appointment of a receiver was filed (petition folio 7. Return folio 4) which alleged the New York Tunnel Company "has a contract for the construction of the tunnel from New York to Brooklyn, to be used for the purpose of a railroad between the Boroughs of Manhattan and Brooklyn." In appointing the Receiver, Honorable George C. Holt, District Judge, authorized the Receiver "in his discretion to continue the business of such bankrupt in constructing the tunnel now under construction, running from Battery Park, in the Borough of Manhattan, under the East River to the Borough of Brooklyn." (Petition folio 8. Return folio 38.) On May 28th following, Mr. Wells, receiver, alleged and proved in a petition for a consulting engineer that "The principal business ness of the said alleged bankrupt is the construction of the tunnel between Brooklyn and New York. (Petition folio 10.) Thereupon, still prior to the adjudication, Judge Holt decreed "It satisfactorily appears that the receiver is conducting the business of said New York Tunnel Company, and requires the advice of a competent engineer skilled in submarine tunnel construction." (Petition folio 12.)

Thereafter, on May 29, 1907, upon consent of the Tunnel

Company, and without a trial, an alleged adjudication was made (Return folio 39, 44). Prior to the adjudication the record affirmatively showed that the Court was without jurisdiction and the adjudication and all proceedings thereon were void.

148 Fed., 832. In re T. E. Hill Co., C. C. A., 7th Circuit, October 25, 1906. Before Grosscup, Baker & Seaman.

A Construction Co. "The proof is undisputed that the sole business of the appellee from incorporation was the construction, under contract of piers and abutments, made of concrete, for railroad bridges, including the work of clearing the foundation, under contract of piers and abutments, made of concrete, for the work. In other words, it was of the class commonly known as 'construction companies' and not within the usual definition of a manufacturer—namely, one 'engaged in manufacturing for sale of articles of commerce.'"

Portland Cement Co., 156 Fed., 83, page 85.

The power to manufacture implies of necessity the power to sell.

"Remington on Bankruptcy," page 84.

"Manufacturing is to be distinguished from merely constructing, and a corporation engaged in structural work is not engaged in manufacturing."

"Remington on Bankruptcy," page 51.

"As is later noted, the record of adjudication imports jurisdiction where jurisdictional findings are merely omitted, and makes the adjudication impervious to attack; but if the record affirmatively shows the debtor did not belong to the classes subject to bankruptcy it would without question be absolutely void on its face." (Reviewing First National Case, 18 A. B. R., 271.) (Also see Elmira Steel Co., 109 Federal.)

In re New York Tunnel Co., 165 F., 284. (Return folio 401.) If a petition for adjudication were made by only two creditors, the law requiring three, there would be a judisdictional defect

on the face of the record, making any adjudication void. On the other hand, if the aggregate amount of claims were stated to be $500, as required by law, and because of setoffs or other reasons was in point of fact less, an adjudication would be an error to be corrected by appeal. So if the petition were against a railroad company there would be on the face of the record such a jurisdictional defect as would make an adjudication void.

II.

If the District Court Has Jurisdiction the Bankruptcy Act Is Unconstitutional in that it Deprives the Unliquidated Tort Creditor of Property Without Due Process of Law.

Judgments arising ex delicto obtained prior to the adjudication in bankruptcy are provable in bankruptcy (Section 63 A).

In New York Tort Creditors having unliquidated claims may attach the property of a corporation (see Code of Civil Procedure, Sec. 635). The liability to the tort claimant accrues upon the injury, not upon its determination. Such claims, though not reduced to judgment, are a class of property, especially in death cases, as is that of complainant Riggs. In death by wrongful act the statute prescribes how such property is to be distributed when recovered. In this case the entire property of the Tunnel Company was seized in bankruptcy without notice to tort creditors, an adjudication was made within one week in a summary manner and the tort creditors are held to have no standing in bankruptcy and are prohibited from asserting any rights or claim to the property in the possion of a "Court of Equity". Such practices, if proper under the statute, do not amount to due process of law and the act is unconstitutional.

"Remington on Bankruptcy," Section 23: "Celerity of procedure intended but not so summary as to deprive of right to defend." (See Lackman vs. Lange, 132 Fed., and citations).

Section 20: "Bankruptcy proceedings are a branch of equity jurisprudence."

Mason vs. Eldred, 6 Wall., 237. The principle is as old as the law and of universal justice that no one shall be bound until he has had his day in court.

In re New York Tunnel Co., 165 F., 284. (Return folio 400.)

It is objected by the contract creditors and by the trustee, among other things, that the Borne-Scrymser Company has no standing because, having previously filed its claim in bankruptcy, it has acquiesced in the adjudication. In re Worsham, 142 F. R., 121, and that the tort claimants have no standing because their claims are not provable in bankruptcy. (In re New York Tunnel Co., 159 F. R., 688. We think these objections are good."

(It is a high degree of judicial interpretation which prevents a contract creditor who has proven a claim from seeking to vacate an inequitable adjudication in bankruptcy and at the same time denies to those who have not or cannot prove their claims in bankruptcy the right to even be heard in opposition thereto.)

In re New York Tunnel Co., 165 F., 284. (Return folio 403, 404.)

(The petitioners and appellants have proceeded throughout under the Bankruptcy Act. But they are strangers to the bankruptcy proceedings, having no right to prove their claims, to defend or to appeal. The most they can do is to call the attention of the court as amici curiae to a want of jurisdiction of the subject-matter appearing on the face of the record. In re Columbia Real Estate Co., 101 F. R., 965. It must be admitted that tort claimants who see the property of a person against whom they make claim seized and administered in bankruptcy to their own exclusion for the benefit of contract creditors have an interest which should be protected and are in bad case if the law affords no remedy.)

III.

Complainant is Without Relief Other Than by This Petition, and the Supreme Court Has Jurisdiction Thereof.

The complainant has not been guilty of laches (see petition folio 19-53) and has exhausted every possible remedy without relief (petition folio 19-53, 57, 58).

This proceeding is justified by the practice of this Court.

Ex parte Bradley, 7 Wall 364.

Virginia vs. Reves, 100 U. S. 313.

Virginia vs. Paul, 148 U. S. 107.

Kentucky vs. Powers, 201 U. S. 1.

Ex parte Wisner, 203 U. S. 1449.

In re New York City Railway.

In this connection counsel cites Section 109, Pomeroy's Principles of Equity:

"Equitable remedies on the other hand are distinguished by their flexibility, their unlimited variety, their adaptibility to circumstances and the natural rules which govern their use. There is, in fact, no lack of variety and application. The court of equity has the power of devising its remedy and establishing it so as to fit the changing circumstances of every case and the complex relations of all the parties."

The power of the Supreme Court of the United States to issue writs of prohibition or mandamus is found in Revised Statutes, Section 688.

"The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States where a State, or an ambassador, or other public minister, or a consul or vice-consul, is a party."

Revised Statutes, Section 716, which is sometimes referred to in the cases on mandamus, provides that:

"The Supreme Court and the Circuit and District Courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by the statute, which may be necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law."

The general principles governing the issue of the writ may be stated as follows:

The writ will issue from this court to a subordinate court of the United States:

(a) When the lower court has jurisdiction of a case but refuses to hear and decide it (ex parte Schollenberger, 96 U. S., 369; In re Connaway, 17 U. S. 421), unless its right to issue writ in such a case has been expressly or impliedly taken away by statute (In re Pennsylvania Co., 137 U. S., 451.

The mandate will be to take jurisdiction and to hear and decide.

(b) When the lower court, having heard the case, refuses to enter a judgment or decree, or refuses to perform some purely ministerial act, like signing a bill of exceptions (Life and Fire Ins. Co. vs. Wilson's Heirs, 8 Peters, 291).

The mandate will be to enter the judgment or decree that to the lower court seems proper, or to perform the ministerial act.

(c) When the lower court, after an appeal to this court, has through misconstruction, mistake or otherwise failed to execute the directions of this court according to what appears to this court to be the manifest meaning of such directions (Gaines vs. Rugg, 148 U. S., 228; In re Potts, 166 U. S., 263).

The mandate will be to execute those directions as construed by this court.

(d) When the lower court on the face of the record has no power to act (Ex parte Bradley, 7 Wall, 364; Virginia v. Rives, 100 U. S., 313; Virginia v. Paul, 148 U. S., 107; Kentucky v. Powers, 201 U. S., 1; Ex parte Wisner, 203 U. S., 449).

The mandate will be to cease to act and to turn over to the proper court or person whatever it has taken possession of in an attempt to exercise jurisdiction.

IV.

The Equities Demand the Relief Prayed For.

The trustees in bankruptcy having failed or refused to bring an action against the stockholders of the Tunnel Company to recover nearly $200,000 paid in dividends on a total capital of $250,000 prior to the completion of the Tunnel Company's only undertaking from money advanced to carry on the work, complainant Riggs as a judgment creditor is prosecuting such an action for the benefit of all creditors and the trustee in bankruptcy, without contributing to the expense of the action, has asserted a claim to all benefits derived therefrom to the exclusion of complainant (petition folio 56).

No intervening rights of importance if any have intervened without notice of the attack upon the jurisdiction (petition folio 53-55).

For all acts of T. Tileston Wells, as defacto Receiver and Trustee, the New York Tunnel Company is liable by having brought about his appointment and by having consented to the adjudication. (Return folio 39.)

Anderson on Receivers, page 414:

"Where through the collusion of a railroad company a receiver is appointed over its property, who takes possession of

TORN PAGE

and operates it, he will be considered as the representative and the mere agent of the company, and for his acts it will be liable. It was said in the first case cited that if the appointment be made collusively for the benefit of the company and with its consent, for the purpose of placing its property beyond the reach of some classes of its creditors, then the receiver will be the servant or agent of the Company, for whose acts it will be responsible as though he had been appointed by its stockholders or directors." (Cites Texas & Pacific Ry. Co. v. Johnson, 76 Tex. 421, 13 S. W. R. 463, 18 Am. St. R. 60; Texas & Pacific Ry. Co. v. Gay, 86 Tex. 571, 26 S. W. R. 599, 25 L. R. A., 52; San Antonio & Arkansas Pass Ry. Co. v. Adams, 11 Tex. Civ. App. 198, 32 S. W. R., 733.)

V.

In Consideration of the Equitable Condition Shown by the Petition and the Record the Relief Prayed for Should be Granted.

Respectfully submitted,

BENJAMIN S. CATCHINGS,

Solicitor for Petitioner.

April 12, 1909.

Supreme Court of the United States.

OCTOBER TERM, 1908.

FILED.
APR 10 1909
JAMES H. McKENNEY,

No. 11
(Original.)

IN THE MATTER

OF

The Application of MARY HATCH RIGGS, as Administratrix of the Goods, Chattels and Credits of Clarence B. Riggs, deceased, in behalf of herself and all others similarly situated, for a Writ of Mandamus against the Honorables George C. Holt and Charles M. Hough, Judges of the District Court of the United States for the Southern District of New York, and against the District Court of the United States for the Southern District of New York.

BRIEF FOR RESPONDENTS.

CHARLES K. BEEKMAN,
Counsel for Respondents.

New York:
Stillman Appellate Printing Co.
1909.

Supreme Court of the United States.

In the Matter

of

The Application of MARY HATCH RIGGS, as Administratrix of the Goods, Chattels and Credits of Clarence B. Riggs, deceased, in behalf of herself and all others similarly situated, for a Writ of Mandamus against the Honorable George C. Holt and Charles M. Hough, Judges of the District Court of the United States, for the Southern District of New York, and against the District Court of the United States for the Southern District of New York.

BRIEF FOR RESPONDENTS GEORGE C. HOLT AND CHARLES M. HOUGH, JUDGES OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK, IN OPPOSITION TO APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION.

STATEMENT OF FACTS.

This matter comes before this Court on an application by Mary Hatch Riggs, as administratrix of

Clarence B. Riggs, deceased, for a writ of mandamus, directed to the respondents and the District Court of which they are Judges, commanding the respondents and that Court to dismiss the petition in bankruptcy, heretofore filed against the New York Tunnel Company, and all proceedings therein, and to vacate the order of adjudication in bankruptcy, also the orders appointing and discharging the Receiver and appointing a Trustee, and further commanding them to desist from exercising any further jurisdiction, excepting the entry of an order dismissing the said petition and the said proceedings; or, in the alternative, that a writ of mandamus commanding them to reopen the alleged adjudication in bankruptcy and allow your petitioner or any party in interest to appear and be heard in opposition to said petition, and the adjudication thereon; or, in the alternative, that a writ of prohibition issue restraining the respondents and the District Court from taking any further proceedings in the matter of the New York Tunnel Company.

The history of this litigation is briefly summarized in the return filed by the respondents, but counsel wish at the outset to call the attention of this Court to what they deem to be the facts particularly vital to the motion now before the Court.

The petition in bankruptcy upon which an adjudication was had, and which is now sought to be set aside, was filed by three creditors on the 27th day of May, 1907, and upon the consent of the bankrupt an adjudication in bankruptcy was thereafter made on the 29th day of May in the same year (Return, fols. 34 to 39, pp. 12-13). At the time of the filing of the petition, the New York Tunnel Company, a New York corporation, was engaged in constructing a tunnel connecting the Borough of Manhattan and the Borough of Brooklyn, in the City of New York, under the bed of the East River.

This tunnel consisted of a steel tube, as it were, and its construction is more specifically described in the affidavit of David L. Hough, which appears at page 75 of the return. After the adjudication was made, and on or about the 17th day of June, 1907, D. Allens Sons Rope Company, one of the contract creditors of the bankrupt, who, was alleged to have a provable claim in bankruptcy, made a motion to set aside the adjudication, and on this motion this creditor was represented by Benjamin S. Catchings, who is the counsel for the petitioner on the motion now before this Court (Return, fols. 179-183, pp. 60-61). This motion was adjourned from time to time, it being understood that such adjournments were had without prejudice to the right of the creditor mentioned to raise the question of jurisdiction of the District Court to make the adjudication which had been made. Before this motion was argued or decided, D. Allens Sons Rope Company, the creditor mentioned, sold their claim and ceased to have any further interest in the bankruptcy proceedings (Return, fols. 169 and 345). Meanwhile, and before D. Allens Sons Rope Company had made the said motion or sold their claim, upon a petition by the Receiver in bankruptcy (Return, p. 17), an order was obtained from the respondent George C. Holt on the 31st day of May, 1907, directing the present petitioner, Mary Hatch Riggs, and her attorneys to show cause why they should not be restrained from prosecuting in the Supreme Court of the State of New York an action for recovery of damages for alleged negligence which was claimed to have caused the death of the present petitioner's testator. Upon the return of this order to show cause, the respondent George C. Holt, directed that the action should be permanently stayed, and that Mary Hatch Riggs, the plaintiff in that action, should proceed before Stanley W. Dexter, as Special Master, to determine and liquidate the amount

of her claim, and should then file proof of such claim as so liquidated, with the Referee (Return, fols. 58-63, pp. 20-21). The petitioner Mary Hatch Riggs and her counsel, who were not satisfied with that ruling and order, filed a petition in the United States Circuit Court of Appeals in and for the Second Circuit, to review the order made by respondent George C. Holt, and in the petition to review attacked the jurisdiction of the United States District Court, denying its power to make any order in the bankruptcy proceedings, and maintained that as the Court had no jurisdiction, the Circuit Court of Appeals should set aside the said adjudication, as well as the order which the petitioner was then seeking primarily to review (see Return, pages 32-33, fols. 96-98). In her said petition to review the present petitioner asserted that the District Court erred as a matter of law in directing that the claims arising out of tort and not out of contract should be liquidated and proved in bankruptcy (Return, fol. 96, p. 32), although counsel for the Receiver and the Trustee had not opposed the filing and proving of such tort claims in the bankruptcy proceedings. After argument, the United States Circuit Court of Appeals decided (Return, pp. 44-48) that the present petitioner was not a party to the bankruptcy proceedings, because her claim, being founded in tort, was not provable in bankruptcy, and, therefore, the prosecution of her suit in the State Court could not be restrained. The Circuit Court of Appeals also held that the jurisdiction of the District Court could not be attacked collaterally in the manner attempted, and expressly refused to pass upon that question.

Thereafter, and on the twenty-fifth day of May, 1908, the petitioner Riggs, reduced her claim to judgment in the Supreme Court of the State of New York, judgment being rendered in her favor against the bankrupt for the sum of Thirty-eight

thousand five hundred and eighty-seven and 17/100 dollars (see Petition for Writ, fol. 19, p. 7).

Before the entry of the said judgment by the present petitioner and on the 11th day of May, 1908, a year after the filing of the petition and the adjudication in bankruptcy, the present petitioner, together with certain other tort creditors and one alleged contract creditor, to wit, Borne Scrymser Company, made a motion before the United States District Court before the respondent Charles M. Hough, to set aside the adjudication in bankruptcy, or to allow the moving parties permission to intervene and plead to the petition, alleging that the District Court had no jurisdiction, for the reason that the bankrupt was not such a corporation as could be adjudged a bankrupt within the meaning of the Bankruptcy Act (Return, fols. 151-155, pp. 51-52).

It will be noticed that in the moving papers submitted on this motion (see Return, fol. 321, also pp. 108-109), it appeared that Borne Scrymser Company had submitted to the jurisdiction of the District Court by filing their proof of claim with the Referee, and the other creditors, being so-called tort creditors, had no standing in the bankruptcy proceedings, as the United States Circuit Court of Appeals had decided in the decision just referred to. After argument of this new motion to vacate the adjudication and allow the so-called tort creditors to intervene and plead, the respondent Hough denied the application and handed down a memorandum, a copy of which appears in the Return (p. 115, fols. 344-5). Thereupon the present petitioner took an appeal to and filed a petition for review in the United States Circuit Court of Appeals. That Court, however, affirmed the order of respondent Hough, stating that the jurisdiction of the District Court was not a

nullity, that it could not be questioned except by direct appeal from the adjudication, and that the petitioner, not being a party to the bankruptcy proceedings, could not properly raise the question in the manner attempted.

Upon the entry of a mandate upon this opinion, the present petitioner did not apply for any writ of certiorari, or by any other process attempt to appeal to this Court within the thirty days prescribed by General Order in Bankruptcy No. 36, but went again before the District Court and moved before the respondent George C. Holt, not upon new papers, not upon further affidavits, but upon all the proceedings that had been had and the papers upon which the previous motions had been heard, for a rehearing of her former motion and for leave to renew such motion (Return, pp. 139-140). When this matter came before respondent Holt he referred the motion for rehearing and renewal to the respondent Charles M. Hough, who had made the order from which the last appeal to the United States Circuit Court of Appeals had been taken. Counsel for the present petitioner then addressed a letter to respondent Hough, asking him to refer the matter to respondent Holt (Return, p. 149). Respondent Holt thereupon addressed a letter to the counsel for the petitioner, stating that he deemed it improper for him to rehear the application inasmuch as the original order which had already been reviewed on appeal had been made by the respondent Hough, and a rehearing before respondent Holt, who was associate district Judge of respondent Hough, would be equivalent to an appeal from one District Judge to another (Return, p. 151). The matter was then remitted to the respondent Hough for further proceedings, and as far as the record shows no proceeding was taken by the present petitioner to proceed to argument before the respond-

ent Hough, and the motion for leave to renew and for a rehearing is therefore now in abeyance.

It will thus be seen that this petitioner has sought to raise the question of jurisdiction of the District Court on two distinct motions and appeals from orders entered on such motions; and that she has prosecuted two appeals to the United States Circuit Court of Appeals in which the question of jurisdiction has been incidentally raised in one appeal and directly in the other. After the decision on the first appeal, the petitioner made no effort to review the case in this, the Supreme Court of the United States, and after the second appeal she has not sought to raise the question by a writ of error or a writ of certiorari. At her own request and upon her own petition the Circuit Court has decided that she is not a party to the bankruptcy proceedings, and from this finding she has taken no appeal, although the decision was rendered over a year ago.

As affecting the rights of other creditors, it is important for the Court to consider the status of the bankruptcy proceedings at the present time as compared to their status at the time of the adjudication.

Counsel for the petitioner delayed in making his motion to set aside the adjudication and for leave to intervene until the 11th day of May, 1908.

Between February 28, 1908, the date of the order allowing the petitioner to proceed in the State Court to the liquidation of the claim, and the 11th day of May, 1908, the date of her motion to set aside the adjudication, the bankrupt had been engaged in liquidating other tort claims, and the stockholders of the bankrupt had contributed from their private means funds with which to settle a number of these claims, as appears in the affidavit of the attorney for the bankrupt, at pages 111-115. Claims asserted in the sum of about $70,000 had been settled by comparatively small payments, and

claims asserted in the sum of $50,000 had been settled by confessions of judgment by the bankrupt, aggregating in all about $3,000 (Return, pp. 111 to 115). Proceedings have been instituted for the recovery of the claim of $2,000,000 against the Rapid Transit Subway Construction Company, as appears in the affidavit of D. L. Hough, contained in the Return at folio 244, page 82, and there will in all probability be a profit of $80,000 realized as a result of the administration of the estate by the trustee in bankruptcy. There is nothing, moreover, in the record to show that there will not be funds to meet the claims of the tort creditors, the validity of some of which, it must be remembered, is as yet undetermined.

During the time between the adjudication on May 29, 1907, and May 11, 1908, the Trustee was, moreover, under the positive obligation to administer the estate in bankruptcy to the best of his ability. As is clearly indicated by the affidavits of Wells (Return, pp. 87-88, fols. 259-267), and of Hough (Return, fols. 241-243, p. 81), long before any motion was made attacking the adjudication, it was necessary to decide whether the business of the bankrupt, in constructing the subway tunnel under the East River, under contract with the Rapid Transit Subway Construction Co., should be continued. The situation confronting the Receiver was most serious, not only on account of the claims of creditors of the bankrupt, including these tort creditors, but also with respect to the entire community in the City of New York.

The tunnel being constructed by the bankrupt was to form the connecting link between the subway system in the Borough of Brooklyn, and that in the Borough of Manhattan (Return, fols. 226-228, 255, p. 76 and p. 85). It was of vital importance to the entire community that the tunnel should be completed at the earliest possible moment.

With respect to the interests of creditors of the bankrupt, when the Receiver took charge the situation was most critical. The chief assets of the estate were the plant and machinery of the bankrupt, valued at $87,000.00, and the claim under the contract for constructing the tunnel (Return, fols. 257-8, p. 86). The tunnel was not completed. It was necessary to maintain an abnormal air pressure therein to prevent flooding and consequent loss. Its cost of construction involved millions of dollars. Even to maintain existing conditions and prevent absolute destruction of this great public work required funds for the employment of men and purchase of supplies. It is obvious that if the Receiver had failed to continue the air pressure in the tunnel at any time, and it had become flooded, an enormous claim for breach of contract would be made by the Rapid Transit Subway Construction Co., reducing possible dividends to creditors to a nominal figure, while rapid transit subway travel between the Boroughs of Brooklyn and New York would have been delayed for years. Any attempt of the Receiver to put upon the Rapid Transit Company the burden of completing the contract would have resulted in a claim for breach of contract, which would have wiped out any claim under the tunnel contract, and probably forced the other creditors of the bankrupt to share with the Rapid Transit Company in the remaining asset, the $87,000.00 plant, which was mortgaged to the Rapid Transit Company as security for the performance of the tunnel contract (Return, fol. 272); furthermore, if the tunnel had been turned over to the Rapid Transit Company the risk was great that the transfer might have resulted by some mishap in the flooding of the tunnel (Return, fols. 241-243, p. 81), which would have made it necessary to reconstruct it *ab initio*.

The difficulties of the situation were accentuated by the lack of funds necessary to carry on the work, amounting to some $100,000.00 per month (Return, fol. 240, p. 80), the actual sum required to complete it, being $819,908.83 (Return, fol. 330, p. 110). It is apparent that it would have been practically impossible for the Receiver to secure funds in so large an amount for such an enterprise, except possibly from the Rapid Transit Company.

Under the foregoing circumstances, with great difficulty counsel for the Receiver and Trustee were able, with the consent of the creditors (Exhibit V, p. 152) to secure from the Rapid Transit Company the necessary funds *under contracts* which appear at pages 89 and 95 of the return, thereby insuring to the community the prompt and successful completion of a great public necessity, and preserving for the creditors a $2,000,000.00 claim against the Rapid Transit Company (Return, fol. 259, p. 87) as well as increasing the estate through profits earned by the Receiver and Trustee, estimated at $80,000.00 (Return, fol. 244, p. 82). This contract was duly approved by order of the Referee (Exhibit V) and to this order the present petitioner did not object nor did she take any steps to review the same.

The preservation of the estate thus accomplished is for the benefit of the tort creditors; for although they may not share in the bankruptcy proceedings with the contract creditors, they concede that the contract claims are in the neighborhood of $60,000.00 (see Petition for Writ, p. 19, fol. 55), well warranting the conclusion that through the bankruptcy proceedings, a fund will be realized sufficient to pay the contract creditors in full, and leave a surplus sufficient to satisfy all claims for tort which are well founded. Now, after the Rapid Transit Company has advanced $800,000.00, and the bankruptcy

proceedings have preserved these assets in which the tort creditors would eventually share, including the plant, valued at $87,000, which otherwise would have been taken by the Rapid Transit Subway Construction Company under its mortgage above referred to, while the tort creditors have lain by, the petitioners come before the Court urging that because the situation is now saved, the interests of the Rapid Transit Company and of the contract creditors may be disregarded, and the bankruptcy proceedings should be upset. While the work has been successfully completed, the accounts between the Trustee and the Rapid Transit Subway Construction Company have not been adjusted, and the claim of the Trustee for such work has not been allowed or paid. The Rapid Transit Subway Construction Company was not made a party to the petitioners' application to set aside the adjudication, although it is at the least a serious question whether its interests, by reason of its loan to the Trustee, will not be seriously prejudiced or even destroyed, if the application were granted.

The situation confronting the petitioning creditors was as follows: At the time of filing the petition in bankruptcy, the situation was critical and a receivership was necessary to protect the property for the benefit of all the creditors as against certain creditors who were threatening judgments and executions. Had the petitioning creditors asked for a Receiver in a State Court or a United States Court, the same parties who are now attempting to set aside the adjudication in bankruptcy would have been the first to file a petition in bankruptcy against the company on the ground of such receivership proceeding in order to control the estate. This would have rendered impossible the arrangement with the Rapid Transit Co., which alone has prevented the absolute destruction of the estate. At

that time, it had been decided by District Courts in the Second Circuit that a corporation engaged in building bridges (*In re* Niagara Contracting Co., 127 Fed., 782), and one engaged in building houses (*In re* Rutland Realty Co., 157 Fed., 296; *In re* Church Construction Co., 157 Fed., 298), were manufacturers under the bankruptcy act. In view of these very recent decisions, and of certain others, the petitioning creditors were advised by their counsel that New York Tunnel Company was subject to bankruptcy, and that it would be unsafe to move for a Receiver in the State or United States Circuit Courts and accordingly the petition in bankruptcy was filed.

FIRST POINT.

MANDAMUS WILL NOT LIE WHERE ITS PURPOSE IS TO PERFORM THE OFFICE OF APPEAL OR WRIT OF ERROR, EVEN IF NO APPEAL OR WRIT OF ERROR IS ALLOWED BY LAW.

In the case of the *American Construction Company vs. Jacksonville Railway*, 148 U. S., 372, the Court said, at page 379:

> "By the same statutes, this Court is empowered to issue writs of mandamus, 'in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States.' Act of September 24, 1789, C. 20, Sec. 13, 1 Stat. 81; Rev. Stat., Sec. 688.
>
> But a writ of mandamus cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. *Ex parte Whitney*, 13 Pet., 404; *Ex parte Schwab*, 98 U. S., 240; *Ex parte Perry*, 102 U. S., 183; *Ex parte Morgan*, 114 U. S.,

174. It does not, therefore, lie to review a final judgment or decree of the Circuit Court, sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law. *Ex parte Newman*, 14 Wall., 152; *Ex parte Baltimore & Ohio Railroad*, 108 U. S., 566; *In re Burdett*, 127 U. S., 771; *In re Pennsylvania Co.*, 137 U. S., 451, 453.

Least of all, can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this 'would be a plain evasion of the provision of the Act of Congress that final judgments only should be brought before this Court for re-examination'; would 'introduce the supervising power of this Court into a cause while depending in an inferior court, and prematurely to decide it'; would allow an appeal or writ of error upon the same question to be 'repeated, to the great oppression of the parties'; and 'would subvert our whole system of jurisprudence.' "

See also

Ex parte Pollitz, 206 U. S., 323.
Ex parte Newman, 14 Wall., 152.
Ex parte Nebraska, 209 U. S., 436, and
In re Key, 189 U. S., 84,

In the Key case the Court said, at page 85:

"The writ of mandamus cannot be used to perform the office of an appeal or writ of error, and does not lie to review a final judgment or decree sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law. It is not granted in doubtful cases, or where there is another adequate remedy, and whether it shall go or not usually rests in the sound discretion of the Court. If sometimes demandable *ex debito justitiae*, it is certainly not on a record like this. *American Construction Company vs. Jacksonville Railway Company*, 148 U. S., 372, 379; *In re Rice, Petitioner*, 155 U. S., 396, 403; High on Extr. Remedies, 3d Ed., Sec. 9."

The above citations are especially pertinent when it is considered that the questions sought to be raised here have been passed upon by the District Court and by the Circuit Court of Appeals, and no appeal, writ of error or application for writ of certiorari has been sought in this Court for the purpose of reviewing the decisions of the lower Courts.

As a general proposition, mandamus will lie to compel an officer to do a ministerial act which a statute absolutely requires him to do without giving him the power to decide whether the given act shall be done or not in a particular case, but where such officer is given judicial powers to decide whether a certain state of facts exists or entitles a given person to certain relief, mandamus will not lie to control the decision of such officer. His acts can be corrected only by review had by appeal, writ of error or certiorari, as the case may be.

In her petition for writ of mandamus, the petitioner cites in support thereof the cases of *Ex parte* Bradley, 7 Wall, 364; Virginia vs. Rives, 100 U. S., 313; Virginia vs. Paul, 148 U. S., 107; Kentucky vs. Powers, 201 U. S., 1; *Ex parte* Wisner, 203 U. S., 449.

None of these cases, however, are pertinent or applicable to the case at bar. It appeared in each case that there was no remedy by appeal or writ of error, and the only process by which the lower Court could be kept within bounds was mandamus. The mandamus sought in each instance, furthermore, did not direct the lower Court or the Judge thereof to decide the matter in any particular way, nor did it call upon the lower Court to reverse any ruling made by it, nor did it attempt to control or review the judicial action of the lower Court in determining any matter before it. The writ as granted in these cases cited by the petitioner merely directed the Justice of the lower Court to

perform a ministerial act—to return to the proper Court cases which the Courts complained of had improperly attempted to control.

In each one of the cases cited jurisdiction depended upon a statute, and in each case it appeared that the statute in question did not give the Court any control over the person or the subject matter, and, therefore, the Court had no power to render any decision or make any order, in the cause, which would be valid.

Thus, in *Ex parte Wisner*, 203 U. S., a case involving jurisdiction dependent upon diversity of citizenship as defined the statute, it appeared that upon a motion to remand the cause to the State court made by one of the parties, it was claimed that the Circuit Court had no jurisdiction. The Circuit Court, however, refused to remand, and upon petition to this Court, mandamus was granted, the Court holding that it was apparent on the face of the record that the statute conferring jurisdiction did not give the Circuit Court jurisdiction of the subject matter of the suit or the person sued, and that there was nothing in the record to justify the Circuit Court in proceeding with the cause. The distinction between the Wisner case and the case at bar is in some respects well pointed out in *Ex parte* Pollitz, 206 U. S., 323, where the Court said (at page 331):

> "The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the Circuit Court to which the decision was by law committed.
>
> The application to this Court is for the issue of the writ of mandamus directing the Circuit Court to reverse its decision, although in its nature a judicial act and within the scope of its jurisdiction and discretion.

> But mandamus cannot be issued to compel the Court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error."

In the Pollitz case the issue, as to whether the presence of defendants other than the Wabash Railroad Company were necessary to the determination of the question involved, was one which necessarily had to be passed upon by the lower Court, and so here the questions involved at the time of the adjudication and upon the later attacks upon the adjudication, were such as the lower Court, being vested with jurisdiction of the subject matter and of the alleged bankrupt, accordingly had jurisdiction to decide (see Third Point, *infra*, p. 24).

The opinion of the Court in *Ex parte* Wisner (*supra*) has been limited by later cases.

See

Ex parte Moore, 209 U. S., 490;
Western Loan Co. vs. Butte & Boston Mining Co., 210 U. S., 368.

In the case of *Kentucky vs. Powers*, 201 U. S., (*supra*), the prosecution of a criminal action was sought to be removed from the State Court of Kentucky to the Circuit Court of the United States. It appearing that the provisions of the revised statutes governing removal and jurisdiction did not justify the removal attempted, nor confer jurisdiction on the Circuit Court of the subject matter or the person, the Court by mandamus directed that the cause be remanded to the State Court.

The case of *Virginia vs. Paul*, presented an attempt to remove from the State court the prosecution of a criminal action. At the time of the filing of the petition for removal, the District Judge granted a writ of *habeas corpus* discharging the

prisoner from custody on the ground that the prisoner was in custody for an act done in pursuance of the law of the United States. On the question of mandamus the Court held that the Circuit Court of the United States had no jurisdiction, and said at pages 122-123:

> "The result is that the Circuit Court of the United States has, without authority of law, assumed jurisdiction of an indictment found in the courts of the State of Virginia for a crime against the laws of the State, and that the State is entitled to have the prosecution remanded to its courts to be there dealt with according to law. For aught that appears on this record, the State is not bound to commence or to carry on the prosecution in the courts of another government, but is entitled to resume its own rightful jurisdiction and authority, and to try the offender in its own courts. If the case should be allowed to proceed in the Circuit Court of the United States, and should finally result in an acquittal of the charge, in whole or in part, the State could not have a writ of error to review the judgment. United States vs. Sanges, 144 U. S., 310. A stronger case for issuing a writ of mandamus can hardly be imagined. The writ may be directed to the judge who has unlawfully assumed jurisdiction of the prosecution; and no previous motion to him to remand the case was necessary. The case is governed in every particular by Virginia vs. Rives, 100 U. S., 313, 316, 323, 324."

On the question of the propriety of the writ of *habeas corpus*, the Court said at pages 123-124:

> "But being, as appears by the records annexed to the petition for a mandamus, as well as by the return to the rule to show cause, an ordinary writ of *habeas corpus*, issued by the District Judge upon the ground that the prisoner was in custody for an act done in pursuance of a law of the United States, the question whether good cause was shown for his discharge

> was to be judicially determined by the judge, in the exercise of the jurisdiction vested in him by Sections 751-753 of the Revised Statutes. His determination might have been reviewed, on the facts as well as the law, by appeal. * * * But it cannot be reviewed or controlled by writ of mandamus."

The opinion of the Court on the question of reviewing the writ of *habeas corpus* by mandamus is directly applicable to the case at bar.

In the case of *Ex parte Bradley*, it appeared that the lower court had disbarred an attorney for a contempt committed before another court, and the Supreme Court of the United States found that the Court which had entered the order of disbarment had no jurisdiction to make such order, and, moreover, that no appeal from such order or writ of error to review the same was possible. The Court said, page 377:

> "The ground of our decision upon this branch of the case is, that the Court below had no jurisdiction to disbar the relator for a contempt committed before another Court. The contrary must be maintained before this order can be upheld and the writ of mandamus denied. No amount of judicial discretion of a Court can supply a defect or want of jurisdiction in the case. The subject-matter is not before it; the proceeding is *coram non judice* and void. Now, this want of jurisdiction of the inferior Court in a summary proceeding to remove an officer of the court, or disbar an attorney or counsellor, is one of the specific cases in which this writ is the appropriate remedy. We have already seen from the definition and office of it, that it is issued to the inferior courts 'to enforce the due exercise of those judicial or ministerial powers with which the crown or Legislature have invested them; and this, not only by restraining *their excesses*, but also by quickening their negligence and obviating their denial of justice.'"

It is thus apparent in the above cases cited by the counsel for petitioner that mandamus has not been granted to review the findings of a lower Court where that Court had jurisdiction of the subject matter and of the person, nor in any of these cases was the writ granted for the purpose of controlling or interfering with the judicial action of the lower Court. It was only issued in the cases referred to to compel the lower Court to remit the cases in question to the proper tribunal and to keep the lower Court from usurping the jurisdiction and authority of other Courts. A succinct statement of the law, showing when mandamus will or will not lie, is contained in the case of *Ex parte* Newman, 14 Wall., 152, where the Court said (at pp. 165-166):

> "Applications for a mandamus to a subordinate Court are warranted by the principles and usages of law in cases where the subordinate Court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a Court having heard the cause, refuses to render judgment or enter a decree in the case, but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate Court in any case, nor will the writ be issued to direct what judgment or decree such a Court shall render in any pending case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate Court is to direct the performance of a ministerial act or to command the Court to act in a case where the Court has jurisdiction and refuses to act, but the supervisory Court will never prescribe what the decision of the subordinate Court shall be, nor will the supervisory Court interfere in any way to control the judgment or discretion of the subordinate Court in disposing of the controversy."

SECOND POINT.

INASMUCH AS AN ADJUDICATION OF BANKRUPTCY CANNOT BE ATTACKED COLLATERALLY, THE PETITIONER IS NOT ENTITLED TO HAVE THE ADJUDICATION SET ASIDE.

Chapman vs. Brewer, 114 U. S., 158 at 169;
Edelstein vs. U. S., 149 Fed., 636 (C. C. A., 8th Cir.);
In re American Brewing Co., 112 Fed., 752 (C. C. A., 7th Cir.);
In re Worsham, 142 Fed., 121 (C. C. A., 8th Cir.);
In re Columbia Real Estate Co., 101 Fed., 965 (D. Ct., Ind.).
In re First National Bank, 152 Fed., at p. 70.

The above cases are authority for the proposition that an adjudication in bankruptcy can no more be attacked collaterally than any other judgment.

In *Evers vs. Watson* (156 U. S., 527, at 533) the opinion reads:

> "But we do not wish to be understood as holding that, even if jurisdiction had not been apparent upon the record, advantage could be taken of it after a final decree, and in a collateral proceeding."

The Court should not entertain an attempt to attack collaterally the adjudication, for a Court would be reluctant to set aside an adjudication upon a motion especially for that purpose.

In re Penn., 4 Benedict, 99 (D. Ct., S. D. of N. Y.).

An analogous situation is found in suits instituted in the United States Courts, where the sole

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In cases where the record shows such diversity of citizenship.

> *Riverdale Mills vs. Manufacturing Co.*, 198 U. S., 188, esp. 197, 198.

In cases where the record does not show such diversity of citizenship.

> *Riverdale Mills vs. Manufacturing Co.* (*supra*).

And even in cases where the record shows that there is not diversity of citizenship.

> *Des Moines Navigation Co. vs. Iowa H. Co.*, 123 U. S., 552, esp. 558, 559.
>
> *Skillern's Executors vs. May's Executors*, 6 Cranch, 267;
>
> Approved in *Evers vs. Watson*, 156 U. S., 527, at 533, and in *Riverdale Mills vs. Manufacturing Co.*, 198 U. S., 188, at 197;
>
> *John Hancock M. L. Ins. Co. vs. Manning*, 7 Fed., 299 (Cir. Ct., S. D. of N. Y.).

It appears in the petition for the writ of mandamus (fols. 24-5) that the petitioner acquiesced in the review of the orders restraining the prosecution in the Supreme Court of the State of New York of the action by the petitioner Riggs, and inasmuch as the petitioner did lie by and await the result of that review she was bound thereby.

It appears in the return (at fols. 319-20) that counsel for the present petitioner, who was counsel for her in the Court below and in the United States Circuit Court of Appeals, appeared on the review of the order staying the Riggs suit, and obtained

an extension of twenty days, and then argued the review before the Circuit Court of Appeals. On both appeals to the Circuit Court of Appeals the present petitioner contested the propriety of the orders made by the District Court on the merits thereof and after the decree of adjudication had been entered. Therefore, we contend, on the authority of Western Loan & Savings Co. vs. Butte & Boston, etc., Co. (210 U. S., 368), that such appearance operated as a waiver to raise the question of jurisdiction.

It also appears in the return (at fols. 154-5) that the present petitioner, through her present counsel, made a motion directly attacking the jurisdiction of the District Court, and after a decision had been rendered denying the motion, took an appeal therefrom to the United States Circuit Court of Appeals, and it was only after the decision of that Court, affirming the decision of the District Court, had been rendered that the petitioner sought the assistance of this Court.

Furthermore, inasmuch as the petitioner on two occasions appeared in the District Court, first on a review from an interlocutory order staying the Riggs action in the State Court, and second on a motion directly attacking the adjudication, the petitioner is bound, as far as the present proceeding is concerned, by the ruling of the Circuit Court of Appeals. After submitting to the jurisdiction of the Circuit Court of Appeals to decide questions involved in the two appeals there taken, including the question of jurisdiction, it is now too late for the petitioner to come before this Court and ask that this Court direct the District Court to dismiss the petition. The two petitions to the Circuit Court of Appeals to review were filed in the bankruptcy proceedings, and thereby the petitioner submitted to the jurisdiction of the bankruptcy court.

Although the Circuit Court of Appeals in its second decision upholding the jurisdiction of the District Court (fols. 400, 401) held that the petitioner had no standing, it expressly decided the question of jurisdiction on the merits without relying in any way on the fact that the petitioner might be considered a stranger to the proceeding. The language is as follows:

> "It is objected by the contract creditors and by the trustee, among other things, that the Borne Scrymser Company has no standing because, having previously filed its claim in bankruptcy, it has acquiesced in the adjudication (*In re* Worsham, 142 F. R., 121) and that the tort claimants have no standing because their claims are not provable in bankruptcy (*In re* New York Tunnel Co., 159 F. R., 688). Although we think these objections are good, still if the appellants and petitioners have called our attention to a jurisdictional defect which makes the adjudication a nullity, we feel bound to consider it."

The writ now sought, if allowed, would be equivalent to directing the District Court, first to reverse its own ruling, and second to reverse the ruling of the Circuit Court of Appeals. This would in effect be granting a mandamus to compel a Court and the Judges thereof to decide a matter in a particular way. It has been repeatedly held that mandamus will not lie for such purpose.

See

In re Rice, 155 U. S., 396.
In re Morrison, 147 U. S., 14.
In re Pollitz 206 U. S., 323.
In re Burdett, 127 U. S., 771.

The present petitioner has now dragged this litigation along for two years and in that time has involved the bankrupt estate in considerable expense. She has sought relief in the lower Courts and has made no effort to go further than those Courts. The

Trustee has followed the rulings of the Circuit Court of Appeals and the District Court. After seeking a forum of her own choosing, it would seem grossly unjust if, after the lapse of two years, the entire proceedings should be quashed by mandamus at the instance of this petitioner. Such action, besides being wholly inequitable, would prevent the speedy and economical administration of bankrupt estates which the Bankruptcy Act was designed to accomplish.

THIRD POINT.

ORIGINAL JURISDICTION HAVING BEEN ACQUIRED BY THE DISTRICT COURT, MANDAMUS WILL NOT LIE.

The alleged lack of jurisdiction consists, it is claimed, in the allegations of the petition in bankruptcy that the New York Tunnel Company was engaged "in the business of building and contracting". Counsel for the petitioner has throughout the proceedings failed to distinguish between jurisdictional defects and defects in pleading. The jurisdiction of the bankruptcy courts is set forth in Section 2 of the Act. There is nothing in this section which intimates or provides what class of companies the District Courts should have jurisdiction over for the purpose of bankruptcy proceedings, nor does it provide that the District Courts should be without jurisdiction to entertain and decide proceedings instituted against any one class of persons or corporations, and the only limitation upon the jurisdiction of the Court as far as persons are concerned, is that the alleged bankrupt must have resided or had its principal place of business, for a period of six months preceding the filing of the petition, in the district over which that particular

District Court had jurisdiction. Sections 3 and 4 of the Bankruptcy Act provide as to what shall constitute a cause of action in bankruptcy, and briefly stated Section 3 provides that it must be alleged and proven, unless admitted, that the alleged bankrupt has done or committed an act which is an act of bankruptcy as defined by that section, and Section 4 declares what corporation shall be subject to decree or adjudication in bankruptcy, and so it must be shown that in a given case the alleged bankrupt is of the class defined in Section 4. To decide these questions the Court is necessarily given jurisdiction of the person and subject matter.

It has been held in a number of cases, which are cited below, that a failure to allege facts showing an act of bankruptcy within the provisions of Section 3, and also a failure to allege that the respondent or the bankrupt is such a person or corporation as may, within the provisions of Section 4, be declared a bankrupt, is not a jurisdictional defect but is merely a defect in the pleading which can be cured by amendment. In other words, the Court has jurisdiction of the person and the subject-matter and can exercise that jurisdiction to decide whether or not, upon the pleadings and proof, a given person or corporation has committed an act of bankruptcy, and whether such a corporation, if it has committed an act of bankruptcy, may be adjudged a bankrupt.

In the case at bar jurisdiction of the Tunnel Company was obtained by its appearance and consent to the adjudication.

Had the petition in bankruptcy alleged that the New York Tunnel Company was engaged "principally in manufacturing, trading, mining or mercantile pursuits", the petitioner would evidently not have complained that the Court had not jurisdiction of the proceedings. As a matter of proof, however, it

might appear that a company alleged to be one engaged in manufacturing, trading or mercantile pursuits was not, as a matter of fact, a company of that description. On the other hand, as a matter of proof, it might appear that a company alleged to be a building and construction company was in fact a company engaged in manufacturing, trading or mercantile pursuits. But in either event, no matter what the allegations in the petition were, the Court would have jurisdiction upon the filing of the petition, to decide the question as to whether or not the company was such a company as could be adjudged a bankrupt. Therefore if for the sake of argument alone we should admit that the petition in bankruptcy in the case at bar, was in any way defective, it is clear that such defects, if any, were those of pleading and did not oust the court of jurisdiction.

Defects in pleadings must be taken advantage of by demurrer or answer, but may be waived. Defects in pleadings however, do not oust the Court of jurisdiction.

See

Metropolitan R'way Receivership, 208 U. S., 90, at 108-109.

Hollins vs. Brierfield Coal & Iron Co., 150 U. S., 380.

In re Altonwood Park, 160 Fed., 448.

Inasmuch as the courts of bankruptcy in many cases act as courts of equity and are clothed with many powers of courts of equity, the language of the Court in the case of Hollins vs. Brierfield Coal & Iron Co. (150 U. S., at p. 380), is especially pertinent to the case at bar:

> "Defenses existing in equity suits may be waived, just as they may in law actions, and when waived, the cases stand as though the objection never existed. Given a suit in which

there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal. Take the present case as an illustration: Suppose the corporation and other defendants had made no defense, and, without expressly consenting, had made no objection to the appointment of a Receiver, and the subsequent distribution of the assets of the corporation among its creditors; it cannot be doubted that a final decree, providing for a settlement of the affairs of the corporation and a distribution among creditors could not have been challenged on the ground of a want of jurisdiction in the Court, and that notwithstanding it appeared upon the face of the bill that the plaintiffs were simple contract creditors; because the administration of the assets of an insolvent corporation is within the functions of a court of equity, and the parties being before the Court, it has power to proceed with such administration."

It is only parties to the bankruptcy proceedings, such as creditors or the alleged bankrupt, who can take advantage of the defects in pleadings, and then only by prompt and proper application. *See Section 18.* The creditors may, within the time prescribed by Section 18 of the Bankruptcy Act, take advantage of any defect in pleadings and be allowed to plead or answer. The petitioner before the Court in the present instance is not even a creditor within the meaning of the Bankruptcy Act.

See

In the Matter of New York Tunnel Company, 159 Fed., 688.

Columbia Real Estate Company, 112 Fed., 643.

In the Elmira Steel Company case (109 Fed., at page 479), the Referee held that the failure to al-

lege the business of the corporation deprived the District Court of jurisdiction. That case, however, is criticized by the Circuit Court of Appeals for the Eighth Circuit *In re* First National Bank of Belle Fourche (152 Fed., at page 70), and has not been cited with approval by any of the higher courts. It will be noticed also that, in the Elmira Steel Company case there was no allegation as to the business of the corporation of any kind, whereas in the petition of the New York Tunnel Company there was a distinct allegation of business, which was equivalent to the formal wording of the statute.

In a recent case in the District Court in the Western District of Kentucky, entitled *In re* Marion Contract and Construction Company (166 Fed., 618), it appeared that involuntary proceedings were instituted against a corporation on November 4, 1908, and the corporation consented to an immediate adjudication and the adjudication was had on November 5. No objection was made until January 20, when a bank which was a creditor of the corporation and whose president and vice-president were officers and directors of the alleged bankrupt, applied for leave to intervene and contest the adjudication. The ground upon which they sought to be made parties and have the proceedings set aside was that the petition in bankruptcy did not show that the bankrupt was a corporation principally engaged in manufacture. Their petition for leave to intervene and be made parties did not show that they were without knowledge of the pendency of the bankruptcy proceedings. The Court said (at pages 620-621):

> "Under a state of case such as now presented we think that both Netherland and the bank should have acted promptly, and their failure to do so makes it the plain duty of the Court to deny the application they now make. We think, both upon reason and the authorities:

1. That granting or denying the motion for leave to file the petition of these creditors at this late day and under all the facts stated is a matter entirely within the discretion of the Court.

2. That, instead of being an abuse of discretion to refuse to allow the petition to be filed, it would be a gross abuse of discretion to permit it.

3. That the bankruptcy courts can hardly be called courts of limited jurisdiction, inasmuch as they are vested exclusively with all jurisdiction in bankruptcy proceedings throughout the entire country.

4. That, even if, as we think is true, the petition in bankruptcy as amended in this case inadequately averred that the company was principally engaged in manufacturing as a basis upon which the adjudication was sought, the matter was not jurisdictional, but was one as to the sufficiency of the pleading to entitle the petitioning creditors to the relief they asked. The District Courts have jurisdiction of every proceeding seeking an adjudication in bankruptcy, whether or not the grounds for the judgment sought are well stated.

5. That as, under Section 25-a, an appeal from an order of adjudication in bankruptcy must be taken within 10 days thereafter, we must assume that the adjudication in this instance has become final, not only as against the parties named on the record, but as against creditors situated as Netherland and the bank are.

6. That Netherland and the Continental National Bank, having had full knowledge of the pendency of the petition of creditors before the adjudication, and having then omitted or declined to intervene under Section 18b, they must be held to have waived by their default all right to attack the adjudication, and

7. That this result should especially be enforced here, because from affidavits filed at the

> hearing it plainly appears that, if the objections now made had been made before the adjudication, they could probably have been entirely removed by a further amendment of the petition of the creditors, showing more fully and in detail the nature and extent of the business of the company, and that it was in fact principally engaged in manufacturing."

Upon the question of jurisdiction, this case is in accord with *In re* Altonwood Park, 160 Fed., 448, where the Court said, at page 449:

> "The Altonwood Park Company, a corporation organized under the laws of the State of New York, was adjudicated a bankrupt. The petitioner, a creditor, filed an application praying that the adjudication should be vacated because the corporation was not subject to be adjudicated a bankrupt. The District Court denied this petition, and the matter comes here for review.
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> "The petitioner evidently thought that he was raising a jurisdictional question and endeavored to protect himself from acquiescing in the jurisdiction of the court. But the question was not one of jurisdiction at all. The District Court had jurisdiction of the parties and of the subject matter. It was for it to determine whether the business of the corporation was such as to bring it within that class of corporations subject to adjudication in bankruptcy. Its judgment was erroneous, but it had power to make it. Still we think the limited appearance—made upon a mistaken conception of the law—no ground for failing to grant the relief prayed for. The petitioner expressly submitted the substantial matter—the validity of the adjudication—to the determination of the Court. The decision upon this question in his favor would end the bankruptcy proceedings. If there are to be no further proceedings, it is immaterial that he be tried to keep out of them."

Another case of the same tenor is *National Bank vs. Klug*, 186 U. S., 202, where the Court said at pages 203-204:

> "Our jurisdiction of this appeal depends on the act of March 3, 1891, by the fifth section of which an appeal or writ of error from or to the Circuit or District Courts will lie directly 'in any case where the jurisdiction of the court is in issue,' and in such cases 'the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.' In this case there is no such certificate, and, moreover, the District Court had and exercised jurisdiction. The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the Court had jurisdiction to so determine, and its jurisdiction over the subject-matter was not and could not be questioned. *Mueller vs. Nugent*, 184 U. S., 15; *Louisville Trust Company vs. Comingor*, 184 U. S., 25; *Smith vs. McKay*, 161 U. S., 355."

In the case at bar Circuit Court of Appeals said, in the course of its opinion (see fols. 402-3 of Return):

> "At the time the adjudication was made in this case building companies had been held in two districts of this circuit to be within the Act; *In re* Niagara Contracting Co., 127 F. R., 782; *In re* Rutland Realty Co., 157 F. R., 296; *In re* Church Construction Co., 157 F. R., 298. We have since decided, In the Matter of the Kingston Realty Co., 160 F. R., 447, that they are not subjects of adjudication. It is, moreover, argued in this case that a tunnel company differs from a building company and is within the Act. Lack of jurisdiction cannot be said to have appeared on the face of the record, and therefore the adjudication made by the District Court, even if erroneous, is not a nullity, as we have held in the Matter of Altonwood Park Co., 160 F. R., 448."

See also,

In re Urban & Suburban Realty Title Co., 132 Fed., 140;
In re Worsham, 142 Fed., 121;
In re Mason, 99 Fed., 256;
Roche vs. Fox. Fed. Cas., 11,974, 16 N. B. R., 461;
In re Plymouth Cordage Co., 135 Fed., 1,000;
In re Brett, 130 Fed., 981;
Loeser vs. Savings Deposit Bank & Trust Co., 163 Fed., 212;
Re First Natl. Bank, 152 Fed., 64.
Re Columbia Real Estate Co., 4 Am. B. R., 411.

In the Plymouth Cordage Co. case (135 Fed.), the Court said at page 1004:

> "The fact that there is no averment that the creditors are less than twelve cannot be more fatal to the right of the petitioner to an adjudication in bankruptcy than the fact that he has made such an averment, which, upon the trial, proves to be without foundation in fact. The truth is that the contention of counsel for the respondent fails to distinguish between the averments essential to jurisdiction over the subject-matter and the parties and those requisite to invoke a favorable adjudication upon the petition. Jurisdiction of the subject-matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy or an insufficient complaint at law, accompanied by proper service upon the defendants, gives jurisdiction to the Court to determine the questions it presents, althoug it may not contain averments which entitle the complainant to any relief, and it may be the duty

of the Court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff. Allegations indispensable to a favorable adjudication or decree include all those requisite to state a complete cause of action, and they comprehend many that are not requisite to the jurisdiction of the suit or proceeding. The averment that all the creditors of Smith were less than twelve was not of the former, but of the latter class. It was not essential to invoke the jurisdiction of the Court over the parties to the proceeding and the property it involved, because the Act of Congress gave that Court, upon the filing of the petition of the creditor, jurisdiction to hear and determine the questions it presented, whether they were questions of jurisdiction or upon the merits."

And also at page 1003:

"The rule in bankruptcy declares that 'the Court may allow amendments to the petition and schedules on application of the petitioner.' Neither the act of Congress nor the rule in bankruptcy excepts jurisdictional averments from the power of the Court to permit amendments, and the established rule is that jurisdictional as well as other averments may be inserted or reformed by amendment. Whalen vs. Gordon, 37 C. C. A., 70, 73, 95 Fed., 305, 308; Bowden vs. Burnham, 8 C. C. A., 248, 59 Fed., 752; Carnegie, Phipps & Co. vs. Hulbert, 16 C. C. A., 498, 70 Fed., 209."

In Roche vs. Fox, Fed. Cas. No. 11,974, cited *In Re* Brett, 130 Fed., 981, a motion to dismiss a petition in bankruptcy was made for want of jurisdiction, because the petition was not signed and verified by a sufficient number of creditors, and for other reasons that need not now be mentioned. In the opinion on the motion, the following language was used:

"It is claimed that the Court has not jurisdiction. Jurisdiction of what? The law gives

> the Court jurisdiction of the subject matter before any petition is filed. And the filing of the petition, the service of process, and the appearance of the alleged bankrupt in the cause are ample to give jurisdiction of the person. What question of jurisdiction remains? In a certain sense, it is true, the Court has not jurisdiction. It cannot proceed to furnish the relief prayed for upon a petition which is demurrable in not containing all the necessary allegations. And the true force of the objections, to my mind, does not go to the jurisdiction of the Court, but only to the sufficiency of the petition as a pleading. The petition in bankruptcy answers to the declaration or complaint in an action at common law or bill of complaint in equity. Its office is to set forth the cause of action. It was never yet held that a complaint in an action at law or suit in equity should be dismissed for want of jurisdiction in the Court when suit has been commenced by service of process, and an attempt made to set out the cause of action, but the complaint is defective in some particulars, in not containing all the essential allegations to make a good case. Such defect would be good ground for demurrer, which, if sustained, leave would be given to amend, which, of course, could not be done if the Court had not jurisdiction."

The case of *In re* Stein, 130 Fed., 377, cited by the petitioner, was a District Court decision, has been criticized and not followed in later case of *In re* Plymouth Cordage Co., 135 Fed. (C. C. A.), p. 1005.

It is, therefore, apparent that, if the petition in bankruptcy is defective, which is not admitted (see Point VIII, *infra*, p. 53), the petitioners who filed the same would be entitled to amend their petition. In this view of the case the petitioner is before the Court, asking that the petition in bankruptcy be dismissed forthwith, without allowing the petitioners leave to amend. By making a direction in conformity

with this prayer, the Supreme Court would be taking away from the District Court and the Circuit Court of Appeals the right to exercise their discretion in allowing or refusing the right to amend, and would further, as previously pointed out, be directing the District Court to decide the question in a particular way. This is not the function of mandamus.

The application made by the petitioner for leave to intervene and plead is, it may be observed, wholly inconsistent with her position that the Court is without jurisdiction of the subject matter and of the bankrupt.

It is apparent that if the petitioner in the present proceeding contends that she is a creditor within the meaning of the Bankruptcy Act, she has shown no right to set aside the adjudication.

Section 18 of the Bankruptcy Act reads:

> "A bankrupt or any creditor may appear and plead to the petition within five days after the return day or within such further time as the Court may allow."

If, therefore, the petitioner was a creditor, her application to set aside the adjudication or for leave to intervene and plead was one addressed to the discretion of the Court, inasmuch as under the provisions of the foregoing section it is apparent that, on April 23, 1908, the time the motion was made to set aside the adjudication or for leave to intervene and plead, she was already in default.

In the Court below the petitioner associated with herself certain so-called "contract creditors", evidently seeking thereby to give a semblance of right to the application to intervene or set aside the adjudication, but even these creditors at that time were in default, and, furthermore, the District Court found that D. Allen's Sons Rope Company, one of the alleged creditors, had in fact sold its claim, and was

no longer a creditor, and that Borne Scrymser Co., the other alleged creditor, had in fact submitted to the jurisdiction of the Court, filed its proof of claim and acquiesced in the adjudication (see Return, fols. 321-7 & 345). Granting, however, that these so-called creditors at the time of the application had not submitted to the jurisdiction of the District Court, they were likewise in default, and any motion on their behalf for leave to intervene and plead or set aside the adjudication was within the discretion of the Court. The exercise of such discretion cannot, however, be reviewed by mandamus.

On the motion to set aside the adjudication, affidavits were filed by both parties, in which the nature of the business being transacted by the New York Tunnel Company was described at length. Upon these motion papers the petitioner submitted to the jurisdiction of the District Court to decide whether or not the adjudication had properly been made and could be sustained, and the District Court and the Circuit Court of Appeals found that the adjudication was proper and should not be disturbed. In this state of the record there can be no review of the findings of the lower Courts by mandamus.

See

Ex parte Newman, 14 Wall., 152.
Ex parte Rice, 155 U. S., 396.
American Construction Co. vs. Jacksonville Rway., 148 U. S., 379.
In re Key, 189 U. S., 84.
In re Parsons, 150 U. S., 150.
Ex parte Nebraska, 209 U. S., 440.

If the application for a writ of mandamus be construed as asking for a writ to compel the District Court to re-decide the motion to set aside the adjudication or to compel the Court to grant a motion, the application for the writ should be clearly denied

on the authority of the case of *Ex parte* Pollitz, 206 U. S., 330.

In re Parsons, 150 U. S., 150, the Court said, at page 156:

> "We cannot by writ of mandamus compel the Court below to decide a matter before it in a particular way, nor can we, through the instrumentality of that writ, review its judicial action had in the exercise of legitimate jurisdiction. *Ex parte* Flippin, 94 U. S., 348; *Ex parte* Burtis, 103 U. S., 238; *In re* Morrison, 147 U. S., 14, 26; *In re* Hawkins, Petitioner, 147 U. S., 486, 490; American Construction Co. vs. Jacksonville, Tampa, &c., Railway Co., 148 U. S., 372, 379, 386; *In re* Humes, Petitioner, 149 U. S., 192."

In American Construction Co. vs. Jacksonville, &c., Ry. Co., 148 U. S., 372, the Court said, at page 379:

> "But a writ of mandamus cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. *Ex parte* Whitney, 13 Pet., 404; *Ex parte* Schwab, 98 U. S., 240; *Ex parte* Perry, 102 U. S., 183; *Ex parte* Morgan, 114 U. S., 174. It does not, therefore, lie to review a final judgment or decree of the Circuit Court, sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law. *Ex parte* Newman, 14 Wall., 152; *Ex parte* Baltimore & Ohio Railroad, 108 U. S., 566; *In re* Burdett, 127 U. S., 771; *In re* Pennsylvania Co., 137 U. S., 451, 453."

In re Pollitz, 206 U. S., 323, the Court said, at page 331:

> "But mandamus cannot be issued to compel the Court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error."

FOURTH POINT.

THE PETITIONER'S APPLICATION FOR LEAVE TO INTERVENE AND PLEAD OR TO SET ASIDE THE ADJUDICATION WAS ADDRESSED TO THE DISCRETION OF THE COURT, AND THE EXERCISE OF THIS DISCRETION WILL NOT BE DISTURBED BY MANDAMUS.

When the District Court, through Judge Holt's order, directed that the present petitioner liquidate her claim before a Special Master, and as liquidated file proof thereof with the Referee, not satisfied with that ruling, and although the Trustee did not make any opposition to her so proving her claim, she sought a review in the United States Circuit Court of Appeals, and as a result of that review that Court held that the petitioner's claim, being for unliquidated damages founded upon tort was not a provable debt in bankruptcy. Since the opinion of the United States Circuit Court of Appeals was rendered, this petitioner has taken no steps to secure a review in this Court either by a writ of certiorari or any other appropriate proceeding on appeal, although the Circuit Court delivered its opinion on the 17th day of February, 1908, more than a year ago.

A copy of the opinion of the Circuit Court of Appeals above referred to is contained in the return filed by the respondents on the present motion at page 44, and is reported in 159 Fed., at page 688.

The aforesaid decision of the Circuit Court of Appeals is in accord with other decisions in bankruptcy, among which may be cited *In re Columbia Real Estate Company*, 112 Fed., 643, in which case the Court held that a creditor within the meaning

of the Bankruptcy Act was only such a creditor as had a provable debt.

Thus the present petitioner has upon application to the Bankruptcy Court obtained the leave which she desired, to wit, permission to proceed in the State Court, and she is bound by the relief which was afforded her at her own instance. As shown in the return, at folios 49 to 57, the proceedings to stay her suit in the State Court were instituted on the 31st day of May, 1907, and her petition to review the order staying such suit was filed on the 9th day of November, 1907 (fol. 102). Six months later, and on the 11th day of May, 1908, the tort creditors, among whom was this petitioner, determined to change their positions and ask for leave to come into the bankruptcy proceedings as parties, and be allowed to plead to the petition and have the adjudication either set aside or opened for their benefit.

In Point VI *ante*, p. 43, of this brief, we discuss the question of laches more fully, but suffice it to say at this time that the petitioner is estopped from asking to be heard as a creditor in the bankruptcy proceedings, or from asking to have them set aside. Litigants cannot shift their position in such cases, especially when the rights of others are affected by such a change of position.

In *Davis vs. Wakelee*, 156 U. S., 680, the Court said at page 689:

> "It may be laid down as a general proposition that where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."

To grant the petitioner any relief in the present proceeding, would, in view of all the circumstances of the case, be directly opposed to the doctrine of this Court enunciated in the case of Brown vs. Lake

Superior Co. (134 U. S., 530), where the Court said (at page 534):

> "But were it conceded that the bill was defective; that a demurrer must have been sustained; and that the appellant, if it had so chosen to act in the first instance, could have defended its possession, and defeated the action, still the decree of the Circuit Court must be sustained. Whatever rights of objection and defence the appellant had, it lost by inaction and acquiescence. Obviously the proceedings had were with its consent. Immediately on filing the bill it entered its appearance, and the same day a Receiver was appointed, without objection on its part. It suffered the bills to be taken *pro confesso*. It permitted the Receiver to go on in the possession of these properties for nine months, transacting large business, entering into many contracts and assuming large obligations, without any intimation of a lack of authority or any objection to the proceedings. After a lapse of nine months, suddenly its policy changed—it contested where theretofore it had acquiesced. And this, not because of any restored solvency or purpose to resume business, but with the evident intent to prevent the equality among creditors which the existing equitable proceedings would secure, and to give preference to certain creditors. For clearly it was the thought of the president of the corporation, himself the owner of a large majority of its stock, whose management had wrought its financial ruin, that after the setting aside of the equitable proceedings the lien of the confessed judgments would attach, and thus those favored creditors would be preferred."

In the case at bar the petitioner, at her own request, was allowed to proceed in the State Court and liquidate her claim, and as a result of such proceeding she has obtained judgment for Thirty-eight thousand five hundred and eighty-seven dollars. Now, after the estate has been conserved through the protection and aid of the bankruptcy

court, the petitioner seeks to have the lien of her judgment attach to the property of the estate and thus favor and prefer a few creditors to the exclusion of others who, during the pendency of the bankruptcy proceedings, have been prevented, through no choice of their own, from reducing their claims to judgment and can only resort to the remedy of filing a proof of claim with the Referee, as provided by the Bankruptcy Act, and receiving in satisfaction of their demands, such dividends as may be declared.

Inasmuch, therefore, as the petitioner had no provable claim in bankruptcy and had sought another forum for the assertion of her rights, her application for leave to re-enter the bankruptcy court and to plead or set aside the adjudication in bankruptcy, was directed solely to the discretion of the Court, which cannot be made subject to review by a writ of mandamus.

That mandamus will not lie to review the exercise and judicial discretion is established by numerous authorities, among which are *Ex parte Railway Co.*, 101 U. S., 711; *Ex parte Taylor*, 14 How., 3; *In re Haberman Manfg. Co.*, 147 U. S., 525. In *Ex parte Railway Co.*, 101 U. S. (*supra*), the Court said, at page 720:

> "We recognize, in its fullest extent, the power of this Court, by *mandamus*, to enforce prompt compliance with its mandates, but is not consistent with the principles and usages of law that we should, in that summary mode, revise the action of inferior courts, as to any matters about which they must or may exercise judicial discretion. 'The writ has never been extended so far, nor ever used to control the discretion and judgment of an inferior court of record acting within the scope of its judicial authority.' *Ex parte Taylor*, 14 How., 3; *Ex parte Many*, *Id.*, 24; *United States vs. Lawrence*, 3 Dall.,

42; *Life and Fire Insurance Company of New York vs. Wilson's Heirs,* 8 Pet., 291; *Ex parte Hoyt,* 13 *Id.,* 279; *Ex parte Myra Clarke Whitney, Id.,* 404; *Ex parte Newman,* 14 Wall., 152."

FIFTH POINT.

THE PETITIONER'S REMEDY, IF ANY, IS BY WRIT OF ERROR OR CERTIORARI.

It may be contended by the petitioner that inasmuch as her application to intervene is directed solely to the discretion of the Court, the exercise of such discretion cannot be reviewed by certiorari or writ of error, and therefore that mandamus is her only recourse. We have seen that if her application was addressed to the discretion of the Court, the exercise of that discretion cannot be reviewed by mandamus. If that is so, then she has no right to mandamus. If, on the other hand, the petitioner claims intervention as of right, and that her application to intervene was not addressed to the discretion of the Court, her proper course was to petition for a writ of certiorari to this Court, or possibly apply to the District Court to certify the question of jurisdiction, under Section Five of the Act of March 3, 1891, or proceed by a writ of error, under Section Six of the same Act of 1891.

The jurisdiction of Appellate Courts in bankruptcy is contained in Sections 24 and 25 of the Bankruptcy Act.

SIXTH POINT.

THE REFUSAL OF THE LOWER COURTS TO SET ASIDE THE ADJUDICATION OR TO ALLOW THE PETITIONER LEAVE TO INTERVENE AND PLEAD WAS JUSTIFIED IN VIEW OF THE LACHES OF THE PETITIONER AND THE FACT THAT RIGHTS OF THIRD PARTIES HAD INTERVENED, WHICH WOULD HAVE BEEN INJURED OR DESTROYED BY ALLOWING THE PETITIONER THE RELIEF SOUGHT.

The adjudication in bankruptcy was entered on the 29th day of May, 1907 (see Return, p. 15) and although the counsel for the present petitioner had notice thereof on the 31st day of May, 1907 (Return, fol. 260), he delayed until May 11, 1908, almost a year afterwards, before he made an application to set aside the adjudication. Inasmuch as the petitioner could raise the question only by demurrer, if at all, the lower Court could not consider the application.

See

In re Urban & Suburban Real Estate Title Co., 132 Fed., 140, and cases cited in Third Point, *supra.*

It appeared in the record before the lower Court that over eighty-five creditors had filed their proof of claim, amounting to over $60,000 (Return, fol. 321), and, furthermore, that the year within which claims might be filed had expired.

There were, moreover, other circumstances which were material in disposing of the question of laches, and the Court was called upon to consider not only the question of the rights of the creditors who had proved their claims but also the situation arising

out of the contract made with the Rapid Transit Subway Construction Company, which contemplated the borrowing of over $800,000 (Return, fol. 330). Too much emphasis cannot be laid upon the situation existing at the time when this loan was arranged.

A tunnel under the East River which was to connect the subway systems of the Boroughs of Manhattan and Brooklyn was but partially completed. Millions of dollars were involved in its construction (Return, fol. 230). If the funds necessary, merely to maintain existing conditions, had not been obtained this tunnel would have been destroyed, and the completion of a great public work would have been delayed for years. This was due to the fact that at the stage of the operation reached when the Receiver was appointed, it was necessary to maintain an abnormal air pressure in the tunnel so as to prevent the influx of water (Return, fols. 241-2); this required funds for the employment of men and purchase of supplies (Return, fol. 240).

Furthermore, only by completing the tunnel could the Receiver have ensured more than nominal assets for payment of dividends to creditors. The only substantial assets of the estate consisted of a claim under the contract for building the tunnel and the plant and machinery of the bankrupt (Return, fol. 257), the latter item was mortgaged to the Rapid Transit Co. as security for the performance of the contract (Return, fol. 272). Obviously, if the Receiver as the successor of the bankrupt had failed to complete the tunnel, a large claim would have been made for breach of contract; such claim would have wiped out any claim of the bankrupt under the contract and would have attached to the plant, the only other asset of the estate, under the mortgage upon it. Such claim

would have been greatly increased, if the tunnel had been injured or destroyed by flooding or other mishap.

As a result of the loan of $800,000.00 the claim of the bankrupt against the Rapid Transit Company estimated at $2,000,000.00 (Return, fol. 259), has been increased by the profits earned by the bankruptcy estate of about $80,000.00 and the plant has been saved for creditors, and rapid transit subway travel between the Boroughs of Brooklyn and Manhattan is an assured fact. The petitioner concedes that the contract claims filed in bankruptcy are only $60,000.00 (see petition for writ, Return, fol. 55). Now they wish to upset the adjudication, after they have lain by and watched the outcome of the bankruptcy proceedings through which not merely have the assets of the estate been preserved, but a profit of $80,000.00 (Return, fols. 244-5) has been added to the estate, thus ensuring payment of such judgments as may be recovered upon the tort claims.

This obligation and this profit are in a way personal to the Trustee. If the adjudication were set aside the lender of such sum would risk the danger of its loss. Creditors might also lose such profit, for the New York Tunnel Company would not be saddled with an obligation which it had not incurred, nor could it claim a profit it had not earned.

That is to say: The contract under which such loan was made contemplated the possible eventual indebtedness of the Trustee to the lender after an account had been made up between them (Return, fols. 261-262). Until the account of the Trustee is made up it is uncertain whether the Trustee will be the debtor. Such a contract cannot be assigned.

Arkansas V. S. Co. vs. H. M. Co., 127 U. S., 379.

Furthermore, it is obvious that in carrying on an undertaking of this character and magnitude various complications must have occurred. The somewhat complicated contract for the storage and sale of the plant used in such work is an example (Return, fols. 264-265, pp. 88-89). Accidents must have occurred.

It would appear, that unless all claims made against the estate are satisfied before the bankruptcy proceeding is vacated, such claims will be destroyed on the discharge of the Trustee.

See

Thompson vs. Northern Pac. Ry. Co., 93 Fed., 384, at 387 (C. C. A. 9th Cir.).

McNulta vs. Lochridge, 141 U. S., 327, at 332.

Davis vs. Duncan, Receiver, 19 Fed., 477.

Am. Bonding & Tr. Co. vs. B & O. S. R. Co., 124 Fed., 866 (C. C. A. 6th Cir.). Petition for certiorari dismissed, 191 U. S., 575.

Metz vs. B. C. & P. R. R. Co., 58 N. Y., 61.

Union Tr. Co. vs. L. H. R. Co., 7 Fed., 513, 516.

Farmers' L. & T. Co. vs. Cent. R. of Iowa, 7 Fed., 537.

Western N. Y. & P. R. Co. vs. P. R. Co., 137 Fed., 343, at 368 (C. C. A. 3rd Cir.).

It appears, therefore, under the authority of the Altonwood Park case that such intervening rights had vested since the adjudication as would induce the Court not to disturb the bankruptcy proceeding.

Thus it was said in Penn Mutual Life Ins. Co. vs. Austin (168 U. S., 685, at 698):

> "In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded with-

> out doing injustice, or that intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect."

Thus *in re* First National Bank (152 Fed., 64, at 71 C. C. A.), on a similar motion to set aside an adjudication, a delay of two months was held to constitute laches where receivers had been appointed and the estate was being administered.

The record in the District Court and in the United States Circuit Court of Appeals, as well as the record before this Court, fail to show that any notice that application was to be made to set aside the adjudication had been given to third persons having intervening rights. Under these circumstances it would have been improper for the lower courts, and it would be improper here, we submit, for the Court to attempt to determine that the rights of third parties have not intervened or that, granting the existence of such rights, there would be no prejudice to them upon the setting aside of the adjudication, without first giving such parties an opportunity to be heard.

Before it should be held that the Rapid Transit Company has obtained no intervening rights, it should have an opportunity to be heard. It has an apparent interest and should not be put to the risk of losing that right through the action of the Court until it has an opportunity to submit proof and be heard.

If there is the barest possibility of the slightest prejudice to its rights, this Court should not take any action until the Rapid Transit Company is made a party to the application, and it seems probable that such rights will be more than prejudiced —destroyed, if the bankruptcy proceedings are vacated. For instance, under its contract in certain contingencies, not yet ascertained, it is entitled to

the issue of certificates of indebtedness. Such right would be destroyed if the bankruptcy proceedings were vacated.

It is obvious that if the adjudication is set aside the Trustee's appointment will thereupon be vacated also and the contract above mentioned will thus be indirectly set aside.

A Court will not vacate a contract, made with its sanction, between one of its officers and a third party unless notice of the application is first given to such third party.

Mooney vs. British Commercial Iife Ins. Co., 9 Abb Pr. N. S., 103.

In this case it was said very pertinently regarding the contracts made by a receiver with the sanction of the Court (9 Abb. Pr. N. S., 105):

> "I do not doubt that the Court has the power, since all contracts with its officers are made subject to its ratification—and in the present instance, the contract was expressly so made—to vacate the agreement and give another direction, if in its judgment that should be done, but to do that without notice, and without hearing the parties who have become interested in the subject by a contingent agreement (of re insurance), is so manifestly unfair, and is such a departure from well-settled practice, that I have no hesitation in saying that an order which has been thus made must be vacated as a matter of ordinary honesty, so that the company may be heard. If it shall be understood that parties dealing with the officers of the Court have no rights, not even the right to claim to be heard, the Court may find itself in a position of great embarrassment, for no one will deal with it upon such terms, and its sales will soon be conducted in the absence of purchasers."
>
> "It is, of course, familiar practice under proper circumstances to order a sale to be vacated, and property to be resold upon the application of the parties to a suit, or some of

them, and although the purchaser may suffer by it; but no one ever heard of any such thing being done without notice to the purchaser, and without making such indemnity to him as the Court should think justice demanded."

Under the present Bankruptcy Act, the practice appears to require notice to the purchaser when an application is made to set aside a sale made by the Trustee.

See

In re Shea, 11 Am. B. R., 207, at 208, 126 Fed., 153, at 154 (C. C. A., 1st Cir.).

Two reasons have been given to warrant the delay in making a motion to set aside the adjudication; (1) that petitioners were not interested until their claims were held not to be provable (Return, fols. 173 to 174); (2) that they expected to have the adjudication set aside on the first petition to review, filed in the U. S. Circuit Court of Appeals (Return, pp. 32 and 33).

As a matter of fact steps were not taken to attack the adjudication before the Circuit Court of Appeals until after October 15th, 1907. At that time almost six months had elapsed since the adjudication. By that time something like $400,000.00 must have been advanced to the Receiver and Trustee, since during ten months over $800,000.00 was so advanced, and during the Receivership lasting a month, more than $120,000.00 was advanced to the Receiver.

Furthermore, before any hearing on the motion of the Allen Co. was had, that company sold its claim and ceased to have any interest in the bankruptcy proceedings (Return, fol. 345).

Counsel for the petitioner was in error in his belief that he could attack collaterally the adjudication on the previous review before this Court. (*In re* Altonwood Park Co., 160 Fed., 448; 20 Am. B. R.

31.) It can hardly be claimed that the bankrupt and third persons rather than the petitioner should suffer by the mistake of their own counsel. Suppose petitioner's counsel had made four or five applications to the District Court, one immediately following the previous one, and such litigation with the ensuing reviews had stretched over a period of several years, before such counsel learned the right procedure for attacking the adjudication. How can it be claimed that such time should not be counted against him on the question of laches.

An analogous situation is developed in the case of a person who sues at law and after a considerable period of litigation is adjudged to have no remedy at law and then sues in equity. The time occupied in the litigation at law will be counted against ihm on the question of laches.

Thus in Varick vs. Edwards (1 Hoffman's Ch. (N. Y.) 382 at 417), it is said:

> "It is equally true, that where a party has resorted to an action at law, when his remedy was in this Court, or to this Court when his remedy was at law, he cannot be protected against the time lost by the wrong proceeding."

See, also, Willard vs. Wood (164 U. S., 502), where, although the claim in question had been the subject of litigation in other suits at law and in equity practically from the accrual of the alleged cause of action, the suit in equity was held to be barred by laches, reference being made to the analogy of the statute of limitations (164 U. S., 523):

> "The general rule in respect to limitations must also be borne in mind, that if a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where, from any cause, a plaintiff becomes nonsuit or the action abates or is dimissed, and during the pendency of the action, the limitation runs, the remedy is barred."

SEVENTH POINT.

THE PETITIONER IS NOT ENTITLED TO A WRIT OF PROHIBITION.

The provisions for the issuance of a writ of prohibition are contained in Section 688 of the United States Revised Statutes, which reads as follows:

> "Sec. 688. The Supreme Court shall have power to issue writs of prohibition in the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a counsel or vice-counsel is a party."

There is no provision in this section for issuance of a writ of prohibition in a bankruptcy case, and it has been held in the case of *Ex parte* Christy (3 How., 292) that a writ of prohibition cannot be issued in such a case.

But aside from the question of this being a bankruptcy proceeding, the Courts have repeatedly held that a writ will not be granted upon the application of a stranger, nor will it be granted after judgment.

Ex parte Rice (155 U. S., 396).

In *Ex parte Rice* the Court said (at pp. 402-403):

> "Without discussing the various matters urged upon our attention by counsel for the petitioner, it is sufficient to say that we are of opinion that the leave asked for cannot be granted.
>
> 1. Where it appears that the Court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some

collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the Court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. Smith vs. Whitney, 116 U. S., 167, 173; *In re* Cooper, 143 U. S., 472, 495. Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition. * * *

The Circuit Court has proceeded to judgment in the premises, and we cannot revise and reverse its decision by resort to this writ in the manner proposed, nor can we command it to adjudicate upon the rights of parties not before it, by directing it to cause securities which may have been deposited to be returned to their owners, and to restore the parties to their original positions. Still less can we direct the hearing of further argument, because counsel may consider that the opportunity for the expression of his views and the presentation of objections has not been as ample as in his opinion should have been afforded."

It appears that after the Circuit Court of Appeals refused to entertain the petition for review filed by the present petitioner, her counsel served a notice of motion for a renewal of her previous motion to set aside the adjudication and for leave to intervene and be allowed to plead, and the matter was referred by the respondent Holt to the respondent Hough, and after being so referred the counsel for the petitioner asked the respondent Hough to refer it back again to respondent Holt, and by letter addressed to petitioner's counsel on January 19, 1909, respondent Holt declined to hear

the matter, and so the motion was remitted to Judge Hough. Since that time counsel for the petitioner has not asked Judge Hough to hear the motion, nor requested him to fix a day for hearing. The motion has, moreover, never been withdrawn, and is consequently still undetermined in the District Court.

It has been held that this Court will not issue a writ of prohibition where a matter is in the course of litigation in the District Court, on due process.

In re Fasset, 142 U. S., 479.

EIGHTH POINT.

THE ADJUDICATION OF THE NEW YORK TUNNEL COMPANY AS A BANKRUPT WAS PROPER.

Notwithstanding the fact that the petition in bankruptcy alleged that the New York Tunnel Company, was engaged in building and contracting, the adjudication was proper. It has never been decided in this Court, and prior to the Kingston Realty Company case (160 Fed., 445), there had never been a decision in the Second Circuit, holding that a construction company was not within the provision of Section 4b of the Bankruptcy Act relating to corporations. At the time the petition in bankruptcy was filed and the adjudication was made in the case at bar the Kingston Realty Company case had not been decided by the Circuit Court of Appeals. Even in that case, however, distinction was made between the construction of houses upon one's own land and the construction of houses upon lands of another, and the Court said upon this point (at page 447):

> "If this corporation had been engaged in constructing houses upon other persons' lands in-

> stead of upon its own, there might be more ground for claiming that the statute applies."

This distinction, we believe, is a substantial one based upon the general purposes for which the bankruptcy statute was enacted as will be pointed out below.

Prior to the decision in the Kingston case it had been the established rule in the Second Circuit for thirty-five years that a person engaged in constructing or erecting structures on the real estate of others for a gross price was engaged in trading, mercantile pursuits and manufacturing, under the provisions of the Bankruptcy Act and the decisions so construing the Act did not appear to have been questioned in other Circuits prior to the Act of 1898.

This was decided in January, 1872, by the then District Judge, later Mr. Justice Blatchford, *in re* Garrison (Fed. Case No. 5254, 5 Benedict, 430, 7 Natl. Bank Reg., 287), in which the Court said:

> "He was a merchant or tradesman. His occupation was that of a stairbuilder. He bought lumber, nails and other necessary materials, and by the labor of workmen employed and paid by him for the purpose, wrought such materials into stairs, for persons who gave him order to *construct* such stairs, and received as compensation from such persons a gross price for the stairs delivered and completed. He was none the less a tradesman because he was, also, a manufacturer of the stairs, or because he did not resell the lumber and other materials in the same state in which he bought them, *or because he did not buy and sell completed stairs.* * * * His schedules show debts to the amount of over $7,000, nearly all of the amount contracted during the year 1868, and nearly all of it for lumber for his business."
>
> (The italics are ours.)

In a somewhat analogous case, the same Judge decided, in refusing a discharge, under the same

clause of the Act of 1867 (*in re* Odell, Fed. Case No. 10,426; 9 Benedict, 209, 17 Natl. Bank R., 73) as follows:

> "It is stated by the bankrupts that they kept horses on livery or boarded horses, that is, kept in their stables horses belonging to other persons, and fed such horses with hay, oats, feed and grain, buying such food and receiving pay for the food which such horses consumed. This was as much a sale of the food as if it had been sold to be taken away from the premises and consumed by the horses of other persons elsewhere. The only difference is that it was sold to be consumed on the premises by the horses of other persons. The purchaser of the food from the bankrupts paid for it—not indeed by the pound or measure, as the bankrupts bought it, but in the amount paid per month or per day for keeping the horses on livery. It would seem, too, that the bankrupts bought some of their horse-feed on credit, for among their debts is a debt of $200 to one Bowne, a dealer in horse-feed."

And in 1901, Judge Brown felt compelled on the authority of the latter case to make the following decision (*in re* Morton Boarding Stables, 108 Fed., 791, at 794):

> "The principal business of this corporation being evidently that of boarding horses for their customers, including the complete care of them, and also the care of wagons, harness, coaches, etc., I should have hesitated, if this were an original question, to consider this corporation as principally engaged in 'trading or commercial pursuits' within Section 4*b* of the Bankruptcy Act. * * * In the case of Odell, 17 N. B. R., 73, Fed. Cas. No. 10,426, in this district, Mr. Justice Blatchford construed the words 'merchant or tradesman' in the Act of 1867, as including livery stable keepers, considering that the purchase and supply of hay, oats, feed and grain (which are the

principal items in this business), and receiving pay therefor in the compensation paid for the board of horses, was equivalent to a sale of the food and constituted 'trading.' This is no doubt a somewhat liberal construction of the word 'trading'; *but as this was the established construction under the former act and has, so far as I know, never been dissented from, and as the business is in general so closely allied and analogous to trading or commercial pursuits, I think I should follow the former construction as the learned Referee has done,* and confirm his report, leaving to the contestants the burden of any review by appeal, should that be desired." (The italics are ours.)

In construing the Act of 1898 the courts should follow the rule that where Congress enacts legislation containing words or phrases which have been judicially construed under an earlier Act on the same subject, it is presumed to know of such construction and to have adopted the construction previously made of such words and phrases. This rule of construction is set forth in

The Devonshire, 13 Fed., 39, at 42.
United States vs. Hermanos y Compana, 209 U. S., 337, at 339.

Furthermore, where the construction of a statute made by subordinate courts has remained unquestioned for a number of years, the higher courts should not overrule such construction unless it is clearly erroneous.

Bate Refrigerating Co. vs. Sulzberger, 157 U. S., 1, at 33.
United States vs. Union Pacific Ry., 148 U. S., 562, at 572.
Munn vs. Wm. Gerst Brewing Co., 99 Fed., 939 (C. C. A. 6th Cir.).

Likewise Acts of Congress should be interpreted in view of the history and conditions bearing upon such enactment.

United States vs. Laws, 163 U. S., 258, at 262, 264.

Mobile & O. R. R. Co. vs. Tennessee, 153 U. S., 486, at 502.

Church of Holy Trinity vs. United States, 143 U. S., 457, at 463.

United States vs. Union Pac. R. R. Co., 91 U. S., 72, at 79.

Preston vs. Browder, 1 Wheat., 115, at 121.

In order, therefore, to determine the purpose of Congress, former legislation may be examined to enable a proper interpretation of a given Act.

See

Lawrence vs. Allen, 7 How., 785, at pp. 792-793.

The legislative intent prevails over the strict letters of the statute.

Oates vs. Natl. Bank, 100 U. S., 239, at 244.

Wheeler vs. McCormick, 8 Blatchf., 267, at 276.

Church of Holy Trinity vs. United States, 143 U. S., 457.

United States vs. Kirby, 7 Wall., 482.

We believe that the history of the bankruptcy Acts enacted by Congress shows that it was the intention of Congress to make subject to bankruptcy as far as possible, by the process of enumeration, all corporations engaged in business requiring purchases of supplies on credit, except public service corporations.

In the early days of English bankruptcy legislation traders were the only persons engaged in business requiring purchases on credit to any great extent. Until 1861, the English bankruptcy acts applied to traders only, and until 1849 only involuntary proceedings in bankruptcy could be instituted.

> Taft, J., in Leidigh Carriage Co. vs. Stengel, 95 Fed., 637, at 647.
> Vaughan Williams, J., in *Ex parte* Painter, L. R. (1895), 1 Q. B., 85, at 88.

The Federal Bankruptcy Act of 1800 was an involuntary law, applying only to traders, bankers, brokers, factors and underwriters.

> Taft, J., in Leidigh Carriage Co. vs. Stengel, 95 Fed., 637, at 647.

The Bankruptcy Act of 1841 (Act Aug. 19, 1841, Sec. 1) provided that practically all natural persons could become voluntary bankrupts. Involuntary bankruptcy was by this Act limited to proceedings against traders, brokers, factors and underwriters.

Under the Act of 1867, practically any person or corporation could become a bankrupt, either voluntary or involuntary. The historical development of bankruptcy legislation is evidenced in the provision making the suspension of payment of his commercial paper by a banker, merchant or trader an act of bankruptcy.

In the Bankruptcy Act of 1898, as amended, Congress receded somewhat from the step taken under the Act of 1867, making all corporations subject to bankruptcy, and limited the bankruptcy of corporations to (1) involuntary proceedings (2) against corporations "engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits" (Sec. 4 *b*), railroad companies

being probably the most notable class of corporations which were liable to bankruptcy under the act of 1867, and are not now subject to bankruptcy.

It is submitted that the history of bankruptcy legislation indicates a purpose at all times to protect the creditors of persons engaged in business of such a kind as to require purchases of supplies on credit to any large extent. In the early days of such legislation, traders were the only persons engaged in such a business. As the field of business broadened and developed, other classes were added, the field of involuntary bankruptcy being kept more narrow than the other. Congress seems to have determined that the field covered by the Act of 1867 was too wide. Hence the Act of 1898 is really the next stage in the widening of the field of bankruptcy after the Act of 1841.

Thus Judge TAFT said in Leidigh Carriage Co. vs. Stengel (95 Fed., 637, at 648, C. C. A., 6th Cir.):

> "This is merely an effort to limit the application of the involuntary feature to that class of corporations which would have come under the head of 'traders' at common law. National banks and State banks are not included, because it was properly assumed by Congress that the statutory provisions for winding up such corporations were usually so summary, complete and drastic that no additional safeguards against frauds were needed."

The purposes of the bankruptcy acts are stated in the same case as follows (95 Fed., 637, at 647):

> "The proper purposes of a bankruptcy act like the present are: First (and this was its original purpose), to enable creditors to protect themselves by summary process against the frauds of their debtors in evading the payment of debts; second, to distribute the assets of the debtor equally among his creditors; and, third, to relieve debtors from the burden

> of debts which, through business misfortunes and otherwise, they have incurred, and which they are unable to pay. * * * The reason why bankruptcy legislation was limited to traders for so many centuries was because it was considered that traders were the class having the greatest opportunity, and therefore most likely to commit the frauds which bankruptcy acts were passed to prevent."

It is therefore submitted that in determining whether a corporation is engaged in manufacturing, mining, trading or commercial pursuits, the purchase of supplies upon credit by the corporation is a far more important factor than the nature of the act which it performs or the property which it delivers for compensation in the course of its business.

Thus in the decisions of Mr. Justice Blatchford under the Act of 1867 previously cited, he lays emphasis on the fact that both the stairbuilder and the livery stable keeper purchased their supplies on credit (Brief, pp. 54-55).

In re N. Y. & N. J. Ice Lines (147 Fed., 214) is consistent with this view as the corporation was not a purchaser of supplies, while a company which purchases its ice is a trader.

> First Natl. Bank vs. Wyoming V. I. Co., 136 Fed., 466, 14 Am. B. R., 448 (D. Ct. Pa.).

The Kingston Realty case is also consistent. For a real estate company's purchases of real estate would, if not paid for in cash, be secured by mortgage.

The authorized principal business of New York Tunnel Company consisted of manufacturing, trading and mercantile pursuits under the Bankruptcy Act.

It must be conceded that the corporation was as much of a manufacturer as a person engaged in building houses for others.

In holding such an occupation to be manufacturing, Judge HOUGH said (*in re* Rutland Realty Co., 157 Fed., 296):

> "The point principally argued upon the demurrer, *i. e.*, whether the allegation that the Rutland Realty Company 'is engaged in the business and was incorporated for the purpose of building houses' brings the alleged bankrupt within the scope of the Act of 1898. * * * I understand the allegation of the petition to mean that the alleged bankrupt did not build its own house, but built or tried to build or intended to build, houses generally to be sold. The most philosophical definition of 'manufacture' known to me is the language of Justice Brown in Tidewater Oil Co. vs. U. S., 171 U. S., 216, viz.: that the word is now 'ordinarily used to denote an article upon the material of which labor has been expended to make the finished product'. It is hard to conceive of any human action more accurately corresponding to this description or definition than the building of a house; and one of the definitions of 'build' found in the Century Dictionary is to 'form by uniting materials into a regular structure'. Turning to the decisions, the Columbia Iron Works vs. National Lead Co., 11 Am. Bank Rep., 340 (6th Circuit), and *in re* Marine Construction & Dry Dock Co., 11 Am. Bank Rep., 640 (2d Circuit), certainly hold that ship-building is manufacture; while *in re* Niagara Contracting Co., 11 A. B. R., 643, distinctly holds that 'the construction of buildings and bridges' is within the Act.
>
> "Remembering the second canon of construction, *i. e.*, that the enumeration of corporations is to be strictly construed, I cannot but think that where a statute declares that all corporations shall be taxed except manufacturing corporations, that the word 'manufacturing' should be construed as strictly in favor of the tax as

> any one could desire the construction of the same word under the Act of 1898. Yet under a Pennsylvania Act of this nature, bridge building companies have been held to be manufacturing companies (Commonwealth vs. Pittsburg Bridge Co., 156 Pa., 507; Commonwealth vs. Keystone Bridge Co., 156 Pa., 500)."

To the same effect *in re* Church Const. Co., 157 Fed., 298.

A similar view has been adopted by the Circuit Court of Appeals for the Eighth Circuit.

> *In re* First National Bank, 152 Fed., 64; 18 Am. B. R., 265.

In this case the Court, speaking through SANBORN, C. J., says (152 Fed., 64, at 67; 18 Am. B. R., 265, at 268):

> "The pertinent averment of the petition for the adjudication was that the Widell Company 'is, and during all said time has been, engaged in the business of manufacturing concrete arches and bridges, manufacturing and dressing stone and selling the same, and railroad and ditch contracting.' The word 'manufacturing' is a generic term of broad significance, advisedly used by Congress to include many species of corporations, and its comprehensive meaning ought not to be whittled away by fine distinctions. Derivatively meaning making with the hand, its ordinary significance is producing a new article of use or ornament by the application of skill and labor to the raw materials of which it is composed. Pin makers, pen makers, shoe makers, furniture makers, lumber makers, steel makers, boot makers, rail makers, engine makers, cement makers, are undoubtedly engaged in manufacturing, and the cogency of the argument that a corporation which makes a pin is manufacturing, while one which makes a bridge is not, fails to appeal to our judgment with convincing force. The latter may make the cement or the steel it uses in its structure. If so, it is engaged in manu-

> facturing the cement or the steel, and, whether it makes them or not, it produces a new and useful article, a bridge, when by the application of skill and labor to the materials of which it is composed it constructs it.
>
> As usual in respect to every question which involves the construction or operation of the bankruptcy law, there is a conflict of authority * * *. But the more persuasive reasons and the weight of the decisions support the view, and our conclusion is, that a corporation principally engaged in constructing concrete arches and bridges and in dressing and selling stone is engaged in a manufacturing pursuit and subject to adjudication in bankruptcy upon an involuntary petition."

In the Western District of New York, it has been held that a corporation engaged in erecting bridges, although the materials were supplied by others, was a manufacturer under the Bankruptcy Act.

> *In re* Niagara Contracting Co., 127 Fed., 782.

The word "manufacturing" contemplates either the original source of the word to make by hand, or the modern process involving the use of machinery, often of great value, employment of laborers, purchase of raw materials, generally on credit, and the turning over of a completed product different from the articles which it had purchased.

> Tide Water Oil Co. vs. United States, 171 U. S., 210, at 216.

The record indicates that the modern meaning of the word exactly conforms to the principal business of New York Tunnel Company. It used equipment representing an investment of $400,000.00 (fol. 110), its pay rolls for labor amounted to from

$30,000.00 to $40,000.00 every two weeks (Return, fol. 240); its purchase of supplies largely on credit ran from $20,000.00 to $60,000.00 each month.

The nature of the processes carried on by the bankrupt, consisting of combining iron, steel, concrete and masonry to form a subsurface structure is indicated somewhat elaborately in the record. At the completion of such work, a completed structure would be turned over to the Rapid Transit Subway Construction Company (Return, pp. 75 *et seq.*). *It should be noticed that neither that Company nor the bankrupt owned the land upon which the structure was to be erected.* New York Tunnel Company was therefore in a position similar to a person who manufactures goods for a prospective purchaser, the process being carried on upon land furnished by such prospective purchaser, but not owned by him.

Even supposing that the work were no more than a construction business, yet this is recognized as a kind of manufacturing. "Construct" is defined by the Century Dictionary to mean to put together the parts * * * erect, built, frame, fabricate. "Manufacture" the same authority defines to make or fabricate as anything for use. That is "construct" is one of the special meanings included in the word "manufacture."

That emphasis on this question should be laid upon the purchase of the materials and their transformation in the hands of the corporation rather than the ultimate disposition of such material when transformed is indicated in White Mountain Paper Co. vs. Morse & Co. (127 Fed., 643), where it was held that a corporation was a manufacturer of paper although since its organization it had done practically nothing save start the erection of paper mills and by letting contracts had obtained the cutting of timber in four foot lengths. In holding the

corporation to be a manufacturer the Court said (127 Fed., 646):

> "Statutes of this general class are not construed in a literal or narrow way, but like customs legislation, they are held as addressing themselves to the general purpose for which they were enacted. This, in this case, is of a commercial, business character. Therefore, clearly, the expressions of the statute under consideration are to be looked at from that point of view."

The above case was followed by the U. S. Circuit Court of Appeals for the Second Circuit *in re* Marine Const. & Dry Dock Co. (130 Fed., 446).

The latter case also develops this view, in holding a corporation to be a manufacturer when its principal business was the building of boats.

To the same effect, Columbia Iron Works vs. Natl. Lead Co., 11 Am. B. R., 340, 148 Fed., 834 (C. C. A. 6th Cir.).

There are two cases which have been cited as opposed to this view.

> Butt vs. C. F. MacNichol Const. Co., 140 Fed., 840 (C. C. A. 4th Cir.).
>
> *In re* T. E. Hill Co., 148 Fed., 832 (C. C. A., 7th Cir.).

These cases involved corporations engaged in building bridges, concrete arches, etc., and the Court in holding such business not to be manufacturing said in the first of the above two cases that a contrary rule would require the holding that building houses is manufacturing.

Notwithstanding these decisions of the Fourth and Seventh Circuits respectively, above referred to, the lower Courts of the Second Circuit have held that both bridge building (*In re* Niagara Contracting Company, 127 Fed., 782) and building houses for others (*In re* Rutland Realty Co., 157 Fed.,

296) were manufacturing companies within the provisions of the Act, and these cases stood unreversed in the Second Circuit at the time adjudication was made.

Two months prior to the filing of the petition in bankruptcy against the New York Tunnel Company the Circuit Court of Appeals for the Eighth Circuit held, moreover, that a corporation engaged in the construction of bridges, concrete, arches, etc., was engaged in manufacturing within the meaning of the Act.

See

In re First National Bank, 152 Fed., 64.

There is a further consideration, however, which is important. It appeared in the Butt case (140 Fed., 840, at 842) that the bankrupt had no extensive plant or machinery, but merely a few portable tools. There was no evidence that it was a large purchaser of supplies on credit. The Hill case cites the Columbia Iron Works case as in accord while it is *contra* (148 Fed., 834).

It is therefore submitted that New York Tunnel Company was a manufacturer and trader, and engaged in mercantile pursuits under the Bankruptcy Act.

LAST POINT.

THE PETITION FOR A WRIT OF MANDAMUS OR FOR A WRIT OF PROHIBITION SHOULD BE IN ALL RESPECTS DENIED WITH COSTS.

Dated April 9th, 1909.

Respectfully submitted,

CHARLES K. BEEKMAN,
Counsel for Respondents.

In re MARY HATCH RIGGS.

APPLICATION AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF CLARENCE B. RIGGS, DECEASED, IN BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, FOR A WRIT OF MANDAMUS AGAINST THE HONORABLES GEORGE C. HOLT AND CHARLES M. HOUGH, JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND AGAINST THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 11, Original. Argued April 12, 1909.—Decided May 17, 1909.

Mandamus is not a proper substitute for a writ of error.

Where the bankruptcy court in adjudicating a corporation a bankrupt is called upon to decide, and does decide, a question of fact, or of mixed law and fact, that adjudication cannot be reviewed by proceedings in mandamus. *Re Pollitz*, 206 U. S. 323; *Re Winn*, 213 U. S. 458.

Where the evidence sustaining an application for an adjudication in bankruptcy is not disclosed this court will not assume that it was not sufficient.

Mandamus to the bankruptcy court to dismiss proceedings in bankruptcy against a corporation because the petition failed to show that the principal business of the bankrupt was trading, printing, publishing, mining, manufacturing or a mercantile pursuit, refused.

THE facts are stated in the opinion.

Mr. Benjamin S. Catchings for petitioner:

The District Court is without jurisdiction over the Tunnel Company. That company was not a corporation principally engaged in trading, printing, publishing, mining, manufacturing or a mercantile pursuit, and this was apparent upon the face of the petition in bankruptcy.

The statute is strictly construed and jurisdiction thereunder is derived from the statute only. *New York* v. *New Jersey Ice Lines*, 147 Fed. Rep. 214.

The classes of corporations enumerated in § 46 as subject to the act, are to be strictly construed and include only corporations clearly within the enumeration. *Chicago Joplin Lead & Zinc Co.*, 104 Fed. Rep. 67; *Butt* v. *C. F. McNichol Const. Co.*, 140 Fed. Rep. 840; Hughes on Fed. Pro., p. 86. Building companies and contracting companies are not within § 4*b* of the statute, and the filing of such a petition did not bring the Tunnel Company within the limited jurisdiction of the District Court, and all action thereon was void. *In re Kingston Realty Co.*, 160 Fed. Rep. 445; *Haul & Kaul Co.* v. *Friday*, 3d Circuit Court of Appeals, Dec. 27, 1907; *In re Mannering* v. *Evans*, 156 Fed. Rep. 109; *In re Elmira Steel Co.*, 109 Fed. Rep. 456.

Prior to the adjudication, the record affirmatively showed that the court was without jurisdiction, and the adjudication and all proceedings thereon were void. *In re Hill Co.*, 148 Fed. Rep. 832; *In re Portland Cement Co.*, 156 Fed. Rep. 83, 85; Remington on Bankruptcy, pp. 51, 84.

If the District Court has jurisdiction the bankruptcy act is unconstitutional in that it deprives the unliquidated tort creditor of property without due process of law.

Under § 63*a* judgments arising *ex delicto* obtained prior to the adjudication in bankruptcy are provable in bankruptcy.

In New York tort creditors having unliquidated claims may attach the property of a corporation. Code of Civ. Pro., § 635. The liability to the tort claimant accrues upon the injury, not upon its determination. Such claims, though not reduced to judgment, are a cass of property, especially in death cases, as is that of complanant Riggs. In death by wrongful act the statute prescribes how such property is to be distributed when recovered. In this case the entire property of the Tunnel Company was seized in bankruptcy without notice to tort creditors, an adjudication was made within one week in a summary

manner and the tort creditors are held to have no standing in bankruptcy and are prohibited from asserting any rights or claim to the property in the possession of a "Court of Equity." Such practices, if proper under the statute, do not amount to due process of law and the act is unconstitutional. *Mason* v. *Eldred*, 6 Wall. 237; *In re New York Tunnel Co.*, 166 Fed. Rep. 284.

Complainant is without relief other than by this petition, and this court has jurisdiction thereof.

The complainant has not been guilty of laches and has exhausted every possible remedy without relief. This proceeding is justified by the practice of this court. *Ex parte Bradley*, 7 Wall. 364; *Virginia* v. *Rives*, 100 U. S. 313; *Virginia* v. *Paul*, 148 U. S. 107; *Kentucky* v. *Powers*, 201 U. S. 1; *Ex parte Wisner*, 203 U. S. 449; Pomeroy's Principles of Equity, § 109.

Mr. Charles K. Beekman for respondents:

Mandamus will not lie where its purpose is to perform the office of appeal or writ of error, even if no appeal or writ of error is allowed by law. *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372; *In re Pollitz*, 206 U. S. 323; *Ex parte Newman*, 14 Wall 152; *Ex parte Nebraska*, 209 U. S. 436; *In re Key*, 189 U. S. 84.

An adjudication of bankruptcy cannot be attacked collaterally, and petitioner is not entitled to have the adjudication set aside. *Chapman* v. *Brewer*, 114 U. S. 158 at 169; *Edelstein* v. *United States*, 149 Fed. Rep. 636; *In re American Brewing Co.*, 112 Fed. Rep. 752; *In re Worsham*, 142 Fed. Rep. 121; *In re Columbia Real Estate Co.*, 101 Fed. Rep. 965; *In re First National Bank*, 152 Fed. Rep. 70. See also *Evers* v. *Watson*, 156 U. S. 527, 533; *In re Penn.*, 4 Benedict, 99; *Riverdale Mills* v. *Manufacturing Co.*, 198 U. S. 188; *Des Moines Nav. Co.* v. *Iowa H. Co.*, 123 U. S. 552, 558; *Skillern's Ex.* v. *May's Ex.*, 6 Cranch, 267; approved in *Evers* v. *Watson*, 156 U. S. 527, 533; and in *Riverdale Mills* v. *Manufacturing Co.*, 198 U. S. 188, 197; *John Hancock Ins. Co.* v. *Manning*, 7 Fed. Rep. 299.

Allowing this writ would be equivalent to directing the District Court to reverse its own ruling, and also that of the Circuit Court of Appeals, and, in effect, to grant a mandamus to compel a court and the judges thereof to decide a matter in a particular way. Mandamus will not lie for such purpose. *In re Rice*, 155 U. S. 396; *In re Morrison*, 147 U. S. 14; *In re Pollitz*, 206 U. S. 323; *In re Burdett*, 127 U. S. 771.

Original jurisdiction having been acquired by the District Court, mandamus will not lie.

Only parties to the bankruptcy proceedings, such as creditors or the alleged bankrupt, can take advantage of the defects in pleadings, and then only by prompt and proper application. § 18. The petitioner is not even a creditor within the meaning of the bankruptcy act. *In Matter of N. Y. Tunnel Co.*, 159 Fed. Rep. 688; *In re Columbia Real Estate Co.*, 112 Fed. Rep. 643. See also *In re Altonwood Park*, 160 Fed. Rep. 448; *National Bank* v. *Klug*, 186 U. S. 202; *In re Urban & Title Co.*, 132 Fed. Rep. 140; *In re Worsham*, 142 Fed. Rep. 121; *In re Mason*, 99 Fed. Rep. 256; *Roche* v. *Fox*, Fed. Cas., No. 11,974; *S. C.*, 16 N. B. R. 461; *In re Plymouth Cordage Co.*, 135 Fed. Rep. 1000; *In re Brett*, 130 Fed. Rep. 981; *Loeser* v. *Savings Bank & Trust Co.*, 163 Fed. Rep. 212; *Re First Nat. Bank*, 152 Fed. Rep. 64; *Re Columbia Real Estate Co.*, 4 Am. B. R. 411.

The petitioner's application for leave to intervene and plead or to set aside the adjudication was addressed to the discretion of the court, and the exercise of this discretion will not be disturbed by mandamus. *Ex parte Taylor*, 14 How. 3; *In re Haberman Mfg. Co.*, 147 U. S. 525; *Ex parte Railway Co.*, 101 U. S. 711 and cases there cited.

Mr. Justice BREWER delivered the opinion of the court.

This is an application by the petitioner for mandamus against Judges Holt and Hough of the District Court of the United States for the Southern District of New York and the

District Court of that district, commanding them and each of them to dismiss all proceedings in bankruptcy against the New York Tunnel Company, or, in the alternative, to reopen the adjudication in bankruptcy and allow the petitioner or any party in interest to appear and be heard in opposition to the petition and adjudication thereof; or, in still further alternative, forbidding them from taking any further proceedings in the matter of the tunnel company, its property, assets and effects.

The facts, briefly stated, are that the tunnel company was engaged in constructing a tunnel from New York to Brooklyn, to be used for the purpose of a railroad between the boroughs of Manhattan and Brooklyn. On May 23, 1907, certain creditors of the tunnel company filed a petition in bankruptcy in the District Court of the Southern District of New York, upon which petition, on May 29, 1907, Judge Holt entered an order adjudicating it a bankrupt, and appointing a receiver. By direction of the bankruptcy court the receiver proceeded with the construction of the tunnel, and successfully completed the work. At the time of the petition in bankruptcy this applicant had an action pending in the State court to recover damages on account of the death of her husband, resulting, as charged, from the negligence of the tunnel company. On May 31, 1907, Judge Holt issued an order to show cause why that action should not be restrained, and proof of the claim be made before a special master. An order of restraint was granted upon this application, which was afterwards set aside by the Court of Appeals, and the applicant, on May 25, 1908, reduced her claim to judgment.

It is contended by the applicant that although the petition in bankruptcy alleged that the tunnel company was "engaged in the business of building and contracting," it failed to show that the principal business of the company was "trading, printing, publishing, mining, manufacturing or a mercantile pursuit," that being the language of the bankruptcy act of 1898, as amended.

We have recently given full consideration to the circumstances under which mandamus will be issued by this court to restrain the action of inferior tribunals. *In re Winn*, 213 U. S. 458. Hence we deem it unnecessary to go into other details of the proceedings in the bankruptcy or the state courts, nor to consider the many questions fully and elaborately presented in briefs and argued by counsel. Obviously, this application is largely in the nature of a writ of error to review the action of the District Court of the Southern District of New York and its judges, and a writ of mandamus is no proper substitute for a writ of error.

The allegation in the petition in bankruptcy is general in its terms that the tunnel company is engaged in the business of building and contracting, but it fails to disclose the particular kind of work for which it is contracting or which it is engaged in building. It might be inferred from the work which it was shown it was doing in this particular case, as well as from its name, that its principal business was that of contracting for the construction of tunnels, but that would be only an inference and not conclusive. Its principal business may have been that of manufacturing and contracting for such manufacturing, and this particular work only a small part of that which it was generally engaged in. What evidence was presented to the District Court to sustain the application for an adjudication in bankruptcy is not disclosed. We may not assume that it was insufficient or that it failed to make certain or probable that the principal business of the company was that of manufacturing and contracting for such manufacturing. We do not deem it necessary to decide the question which is argued by counsel, whether the adjudication of the bankruptcy court can be challenged collaterally or whether indeed this is only a collateral attack. *Manson* v. *Williams*, 213 U. S. 453. We rest our conclusion upon the proposition that the District Court in adjudicating the tunnel company a bankrupt was called upon to decide, and did decide, a question of fact or of mixed law and fact, and that such adjudication cannot be re-

viewed by proceedings in mandamus. *In re Pollitz*, 206 U. S. 323, 331; *In re Winn*, 213 U. S. 458.

The rule is discharged and the writ of mandamus denied.